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SUPREME COURT, U.S.

75-5706

IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1975  
No. A-182

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CHARLES WILLIAM PROFFITT,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

---

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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. A - 182

CHARLES WILLIAM PROFFITT,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF FLORIDA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Florida filed on May 28, 1975.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Florida is reported at 315 So.2d 461 (Fla. 1975) and is set out in Appendix A hereto, pp. 1a-7a, infra.

JURISDICTION

The judgment of the Supreme Court of the State of Florida was filed on May 28, 1975, and is set out in Appendix A hereto. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTION PRESENTED

1. Whether the imposition and carrying out of the sentence of death for the crime of first degree murder under the law of Florida violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.
2. This case also involves the following provisions of the statutes of Florida:

Fla. Stat. Ann. §755.082 (1974-1975 supp.)  
Penalties for felonies and misdemeanors

"(1) A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than twenty-five (25) calendar years before becoming eligible for parole unless the proceedings held to determine sentence according to the procedure set forth in section 921.141 results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.

(2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, a person convicted of a capital felony shall be punished by life imprisonment as provided in subsection (1).

(3) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1) . . . ."

Fla. Stat. Ann. §782.04 (1974-1975 supp.)  
Murder

"(1)(a) The unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when

1/ This section was amended in 1974, and the statutory definition of second degree murder was altered slightly. Florida Laws 1974 c.74-383, §14 (effective July 1, 1975) enacts a new §782.04, which provides:

committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of seventeen (years) when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in §755.082.

(b) In all cases under this section the procedure set forth in section 921.141 shall be followed in order to determine sentence of death or life imprisonment.

(2) When perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, or when committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, except as provided in subsection (1), it shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment in the state prison for life or for such term of years as may be determined by the court.

(3) When perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate any felony other than arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, it shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in section 775.084."

1/ Cont'd "782.04 Murder

(1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of or in the attempt to perpetrate any arson, rape, sodomy, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person eighteen years or older when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in chapter 775.

(b) In all cases under this section the procedure set forth in §921.141 shall be followed in order to determine sentence of death or life imprisonment.

(2) The unlawful killing of a human being when perpetrated by any act imminently dangerous to another, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in chapter 775.

(3) When a person is killed in the perpetration of or in the attempt to perpetrate any arson, rape, sodomy, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb by a person other than the person engaged

Fla. Stat. Ann. §782.07 (1974-1975 supp.)

Manslaughter

"The killing of a human being by the act, procurement or culpable negligence of another, in cases where such killing shall not be justifiable or excusable homicide nor murder, according to the provisions of this chapter, shall be deemed manslaughter and shall constitute a felony of the second degree, punishable as provided in §775.082, §755.083, or §775.084."

Fla. Stat. Ann. §784.02 (1974-1975 supp.)

Punishment for assault

"Whoever commits a bare assault is guilty of a misdemeanor and, upon conviction, shall be guilty of a misdemeanor of the second degree, punishable as provided in §755.082 or §755.083."

Fla. Stat. Ann. §784.03 (1974-1975 supp.)

Punishment for assault and battery

"Whoever commits assault and battery is guilty of a misdemeanor and, upon conviction, shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083."

Fla. Stat. Ann. §784.04 (1974-1975 supp.)

Aggravated assault

"Whoever assaults another with a deadly weapon, without intent to kill, shall be guilty of an aggravated assault, and shall be guilty of a felony of the third degree, punishable as provided in §775.082, §775.083, or §775.084."

Fla. Stat. Ann. §784.06 (1974-1975 supp.)

Assault with intent to commit felony

"Whoever commits an assault on another, with intent to commit any capital felony or felony of the first degree shall be guilty of a felony of the second degree, punishable as provided in §775.082, §775.083, or §775.084. An assault with intent to commit any other felony constitutes a felony of the third degree, punishable as provided in §775.082, §775.083, or §775.084."

1/ Cont'd

in the perpetration of or in the attempt to perpetrate such felony, the person perpetrating or attempting to perpetrate such felony shall be guilty of murder in the second degree which constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in chapter 775.

(4) The unlawful killing of a human being when perpetrated without any design to effect death, by a person engaged in the perpetration of or in the attempt to perpetrate any felony, other than any arson, rape, sodomy, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb, ... shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in chapter 775."



1a/

Fla. Stat. §921.141 (1974-1975) supp.)  
Sentence of death or life imprisonment for capital fel-  
onies; further proceedings to determine sentence

"(1) Separate proceedings on issue of penalty.  
Upon conviction or adjudication of guilt of a defendant of a capital felony the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by section 755.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsection (6) and (7), of this section. [2/]  
Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury. After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

- (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);
- (b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist, and
- (c) Based on these considerations, whether the defendant should be sentenced to life . . . or death.

(3) Findings in support of sentence of death.  
Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

- (a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and
- (b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by

1a/ Subsection (1) of this statute was amended slightly in 1974 by Fla. Laws 1974, c. 74-379 (effective October 1, 1974) to provide that if through "impossibility or inability", the trial jury is unable to reconvene for a hearing or sentencing, a special jury may be summoned.

2/ The subsection setting forth aggravating circumstances and mitigating circumstances in Fla. Stat. Ann. §921.141 (1974-1975 Supp.) however, are numbered respectively, (5) and (6).

specific written findings of fact based upon the circumstances in subsection (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with section 775.082.

(4) Review of judgment and sentence. The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances.-- Aggravating circumstances shall be limited to the following:

- (a) The capital felony was committed by a person under sentence of imprisonment.
- (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
- (c) The defendant knowingly created a great risk of death to many persons.
- (d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
- (e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
- (f) The capital felony was committed for pecuniary gain.
- (g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
- (h) The capital felony was especially heinous, atrocious or cruel.

(6) Mitigating circumstances.-- Mitigating circumstances shall be the following:

- (a) The defendant has no significant history of prior criminal activity.
- (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- (c) The victim was a participant in the defendant's conduct or consented to the act.
- (d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.
- (e) The defendant acted under extreme duress or under the substantial domination of another person.
- (f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
- (g) The age of the defendant, at the time of the crime."

Fla. Stat. Ann. §922.09 (1973) Capital cases

"When a person is sentenced to death, the clerk of the court shall prepare a certified copy of the record to the governor. The sentence shall not be executed until the governor issues a warrant, attaches it to the copy of the record, and transmits it to the warden, directing him to execute the sentence at a time designated in the warrant."



Fla. Stat. Ann. §922.10 (1973)

Execution of death

sentence

"A death sentence shall be executed by electrocution. The warden of the state prison shall designate the executioner. The warrant authorizing the execution shall be read to the convicted person immediately before execution."

Fla. Stat. Ann. §922.11 (1973)

Regulation of

execution

"(1) The warden of the state prison or a deputy designated by him shall be present at the execution. The warden shall set the day for the execution within the week designated by the governor in the warrant.

(2) Twelve citizens selected by the warden shall witness the execution. A qualified physician shall be present and announce when death has been inflicted. Counsel for the convicted person and ministers of the gospel requested by the convicted person may be present. Representatives of news media may be present under regulations approved by the head of the department of general services. All other persons except prison officials and guards shall be excluded during the execution.

(3) The body of the executed person shall be prepared for burial and, if requested, delivered at the prison gates to relatives of the deceased. If a coffin has not been provided by relatives, the body shall be delivered in a plain coffin. If the body is not claimed by relatives, it shall be given to physicians who have requested it for dissection or be disposed of in the same manner as are bodies of prisoners dying in the state prison."

This is a petition for a writ of certiorari to review the judgment of the Supreme Court of Florida filed on May 28, 1975, affirming petitioner's conviction of first degree murder and sentence of death. Petitioner, Charles William Proffitt, an indigent white male, was sentenced to die by the Circuit Court for Hillsborough County on March 21, 1974, following his conviction of the murder of Joel Medgebow.

Dr. Robert Charles Hutchinson was certified as a pathologist, but only after he performed an autopsy on the corpse depicted in the photograph marked State's exhibit number one. (R220-225) Defense counsel's objection to Dr. Hutchinson's expert testimony on the ground that he was unqualified as an expert was overruled. (R225) The doctor gave his opinion that death was caused by acute shock (R229) the result of bleeding (R230) caused by a stab wound seven centimeters deep into the pericardium. (R226-228)

Stephen A. Moore, an identification technician with the Tampa Police Department (R231) went to apartment number 104 at 115 South Lois (R223) on July 10, 1973. (R231) At the apartment, he took twelve photographs (R236) seven of which he identified as such for the prosecutor. (R232) Mr. Moore also took the photographs identified by Dr.

Hutchinson, which was admitted into evidence without objection. (R232-233) Mr. Moore lifted five fingerprints from a sliding glass door, four "on the inside and one . . . off the door handle on the outside." (R234)

Burt Madix, another identification expert with the Tampa Police (R237) was qualified as an expert as to fingerprint identification, without objection. (R238) On July 17, 1973, he examined the fingerprints taken from the apartment (R239) and determined that one and possibly another were clear enough for comparison purposes. (R240) Neither of the decipherable fingerprints matched the appellant's fingerprints. (R242-243)

Patricia Kay Medgebow, Joel's widow, was at his apartment on 115 South Lois on July 9, 1973, and went to bed about ten o'clock that night. (R248-249) She woke up about quarter of five the next morning at the sound of a moan and saw her husband propped up on one elbow, holding what turned out to be a knife, when suddenly a man jumped up and hit her three times in the face. (R250,251)

Mrs. Medgebow called the police. (R252) Each of the first two people she talked to listened to her story, then switched her to another line. (R261) She pulled Joel to the floor the better to give him artificial respiration and cardiac massage. (R252) Then she went to an apartment across the hall to get a friend. (R252)

She noticed that the sliding glass door was open when she awoke, and believed that it was closed when she went to bed. (R252) Her assailant was a white male with light brown hair wearing a white pin-striped shirt with long sleeves rolled up and the tail out over a pair of grey or khaki trousers. (R255) The prosecutor asked Mrs. Medgebow to "look around the courtroom and see if you can recognize the person that struck you" and she replied "No, I don't see anyone." (R254)

On cross-examination, Mrs. Medgebow testified that she had been separated from her husband for two months and had visited in apartment 104 on about five occasions after the separation. (R258) On account of artificial lights in the parking lot and on the wall of the apartment building, "It was quite a bit of light in there." (R260) Her assailant's shirt did not have a Maas Brothers' emblem. (R262) Defense counsel brought out discrepancies between Mrs. Medgebow's trial testimony and testimony she had given on deposition as to the intruder's physical characteristics. (R263-266)

Mrs. Medgebow testified that she had smoked a joint of marijuana earlier the evening of July 9, 1973, but had shared the "joint between five people." (R268) Defense counsel sought to inquire as to any connection between the decedent's use of drugs and his death, but the prosecutor's objection was sustained and the trial judge instructed the jury to disregard the question. (R268-269)

Ben Stinson, who lived in apartment 102 across from Joel Medgebow (R272) was awakened by Mrs. Medgebow on the morning of July 10, 1973. (R273) He went through the opening left by the sliding glass door in search of the malefactor but found nobody. (R 274) The apartment had not been ransacked. (R276)

Johnny E. Perkins, a Tampa police corporal, (R278) arrived at the Medgebow apartment the morning of July 10, 1973, in response to a call. (R279) Officer Bushnell was with him. Id. The sliding glass door was bent slightly and scratched. (R284,285) Mr. Perkins identified the knife marked State's exhibit number nine as the one he had taken from the apartment to the property room of the Tampa Police Department. (R287) State's exhibits two through eight came into evidence without objection. (R282-284)

During cross-examination, defense counsel asked whether Mr. Perkins had found "any contraband in the apartment." (R296) Prosecution objection to this question was sustained. (R298)

Larry Roy Gedesse, a co-worker with appellant at Maas Brothers (R302) left work about seven or seven thirty o'clock the evening of July 9, 1973, at the same time as the appellant. (R303) The appellant was driving a white Dodge or Plymouth and met Mr. Gedesse at Caesar's Palace, a bar on Dale Mabry. (R304) When Mr. Gedesse left the bar at ten thirty or eleven, the appellant was still there with Michael Seary. (R305)

Michael Charles Seary, also a fellow employee at Maas Brothers (R307), arrived at the bar after work and stayed until about three in the morning of July 10, 1973. (R304) The appellant drove Mr. Seary to his Montgomery Avenue home in a white Dodge. (R310) The appellant who had been drinking, left the Seary home at half past three or quarter till four. (R311)

After cross-examination of Seary, there was a short recess. (R314) The State then recalled Mr. Seary, over defense objection. (R315-317) Mr. Seary testified that the rendezvous at Caesar's Palace on July 9, 1973, had not been discussed earlier in the day of July 9, 1973. (R320)

Patricia Ann Proffitt, the appellant's wife, (R321) was living at the DeSoto Trailer Park with her husband, Mary Bassett and Mary Bassett's daughter on July 9, 1973. (R322) The appellant went to work that day in a white Dodge, 1964 model, wearing a white shirt and grey pants. (R323) The appellant returned to the trailer about quarter past five on July 10, 1973. (R325) He had on the same clothes as when he left except that he was barefoot. (R326)

The trailer has a living room, a bathroom, a kitchen, two bedrooms, and a hallway. (R325) The appellant went into a bedroom, packed and left. (R326) Mrs. Proffitt then went to a telephone and called the police. (R328) She next saw the car in which her husband left the trailer at a place of business in Brooksville. Id.

On cross-examination, Mrs. Proffitt testified that the white shirt worn by appellant when he left for work and which he still wore on his return had a blue oval emblem on it. (R331) Mrs. Bassett contributed one hundred dollars monthly to rent totaling two hundred dollars including utilities. (R330) The appellant made ninety to a hundred dollars weekly. Id.

Vance Catlin, a Tampa policeman, went to the Proffitt trailer at 5:45 A.M. on July 10, 1973, and took photographs which came into evidence, without objection, as State's exhibits numbers twelve, thirteen and fourteen. (R335) He also seized a shirt and a pair of pants, which were marked at State's exhibits numbers ten and eleven, respectively. (R334)

M.O. Stamatakis, another Tampa policeman, spoke to Mesdames Bassett and Proffitt at the police station on July 10, 1973, and then went with them to the State Attorney's Office. (R340) Mr. Stamatakis sent the knife and shirt to Washington and put them back in the property room when they were returned by mail. (R342,343) State's exhibits nine, ten and eleven came into evidence without objection. (R346) A week before the trial, Mr. Stamatakis measured the distance between 115 South Lois and the DeSoto Trailer Park as 6.6 miles. Id. Over objection, he testified it had taken eleven minutes to make the drive.



Mr. R. J. Peters, a Florida Highway Patrolman, (R353) found a 1964 Dodge automobile abandoned on State Road 50 about 6:35 A.M. on July 10, 1973. (R353-355)

Paul Rene Bidez, an FBI serologist (R357), testified that the blood on the knife was human blood, type A, the same type the decedent had. (R359-360) Droplets of blood on the shirt were human blood of an indeterminate type. (R361) Mr. Bidez testified that a stain had a crescent shape "as though something bloody had been wiped." (R361) Defense counsel's objection to this remark was sustained, but the prosecutor reiterated the testimony in the presence of the jury while arguing after the court had ruled. (R362)

On cross-examination, Mr. Bidez testified he was unable to determine how long the stains had been on the shirt. (R363) An examination of the knife for fingerprints yielded none. (R364)

Mary Helen Bassett and her daughter shared a trailer with the Proffitts. (R367) Over objection, Mrs. Bassett testified she awoke about half past five on July 10, 1973, and overheard a conversation between the appellant and his wife. (R375) The appellant told his wife he had stabbed a man. (R376-377) Defense objection on hearsay grounds was denied and Mrs. Bassett testified to questions Mrs. Proffitt asked the appellant. (R377) The appellant also said he struck a woman. (R379) Although Mrs. Bassett never saw the appellant, she was sure his was the voice she heard. (R388)

At the close of the evidence, the trial court instructed the jury that it could return verdicts of guilty of first degree murder, guilty of second degree murder, guilty of third degree murder, guilty of manslaughter, or not guilty. (R488-490) The jury found petitioner guilty of first degree murder. (R491) A sentencing hearing was held following the verdict. The State offered into evidence a certified copy of a document from the State of Connecticut showing that petitioner had been convicted, on July 11, 1967, of breaking and entering without permission. Over objection, the document was admitted. (R495)

The State called James Crumbley, M.D. The doctor testified that he had interviewed petitioner in the Hillsborough County Jail on two occasions. Both interviews were at petitioner's request and both dealt with the charges then pending against him. On both occasions petitioner admitted that he had killed a man as a result of an "uncontrollable desire". He explained that he had "[r]ode around and found a place where a patio door was open and he went in and killed a man, that he stabbed him and that he was now facing trial". (R498) According to Dr. Crumbly, petitioner felt that same "uncontrollable desire" building up again and was concerned that he would kill another person unless he received some treatment for his emotional condition. When asked if he considered petitioner a danger to society, Dr. Crumbley answered "Absolutely". (R500)

The State offered no further evidence in aggravation and petitioner offered no evidence in mitigation. (R505) The court then instructed the jury that:

"... the final decision as to what punishment should be imposed or shall be imposed, is the responsibility of the Judge. However, it is your duty to follow the law which will now be given you by the Court and render to the Court an advisory sentence, based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

If you do not find that there existed any of the aggravating circumstances which have been described to you, it would be your duty to recommend a sentence to life imprisonment. If you should find one or more of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist.

If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence which should be imposed."

(R452, 454, 456)

The jury's sentencing verdict stated "[t]he majority of the jury advise and recommend to the court that it impose the death penalty upon the defendant, Charles William Proffitt. (R535)

The court ordered that petitioner be examined by psychiatrists before sentencing. (R537) The report of both doctors said, in essence, that petitioner was competent at the time of the offense and at the trial. He also understood the consequences of the trial and the possible sentence which could be imposed. (R544)

Sentencing was held on March 21, 1974. The court concurred with the jury's finding that "the aggravating circumstances of this case far outweigh any mitigating circumstances shown to exist". (R556) Petitioner was sentenced to death. (R557)

The material portions of the court's written "Findings of Fact in Support of the Death Penalty" reads:

AS TO AGGRAVATING CIRCUMSTANCES:

(A) That the Defendant, CHARLES WILLIAM PROFFITT, murdered JOEL RONNIE MEDGEBOW from a premeditated design and while the Defendant, CHARLES WILLIAM PROFFITT, was engaged in the commission of a felony, to-wit: burglary.

(B) That the Defendant, CHARLES WILLIAM PROFFITT, has the propensity to commit the crime for which he was convicted, to-wit: Murder in the First Degree and is a danger and a menace to society.

(C) That the murder of JOEL RONNIE MEDGEBOW by the Defendant, CHARLES WILLIAM PROFFITT, was especially heinous, atrocious and cruel.

(D) That the Defendant knowingly through his voluntary and intentional acts leading up to and during the course of the commission of the offense for which he was convicted created a great risk of serious bodily harm and death to many persons.

AS TO MITIGATING CIRCUMSTANCES:

The Court finds that the enumerated mitigating circumstances set forth in F. S. 921.141(7) are primarily negated, in that,

(A) The Defendant, CHARLES WILLIAM PROFFITT, was convicted in 1967 of Breaking and Entering without permission.

(B) That the capital felony for which the Defendant, CHARLES WILLIAM PROFFITT, was convicted was not committed while the Defendant, CHARLES WILLIAM PROFFITT, was under the influence of extreme mental or emotional disturbance.

(C) That the victim, JOEL RONNIE MEDGEBOW, was not a participant in the Defendant's conduct nor did the victim, JOEL RONNIE MEDGEBOW, consent to the act.

(D) That the Defendant, CHARLES WILLIAM PROFFITT, was the only participant in the capital felony for which he has been convicted.

(E) That the Defendant, CHARLES WILLIAM PROFFITT, did not act under extreme duress during the commission of the offense nor was he, during that period of time under the substantial domination of another person.

(F) That at the time of the commission of the offense the Defendant's capacity to appreciate the criminality of his conduct or to conform this conduct to the requirements of law was not substantially impaired.

(G) The age of the Defendant, CHARLES WILLIAM PROFFITT, to-wit: age 28 years, has no particular significance and therefore is not a mitigating circumstance.

The Supreme Court of Florida affirmed petitioner's conviction and sentence. Proffitt v. State, 315 So.2d 461 (Fla. 1975). On August 29, 1975, Mr. Justice Powell granted petitioner a stay of execution "pending the timely filing and disposition by this Court of a petition for a writ of certiorari".



HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Petitioner moved in this trial court to dismiss the Indictment charging him with first degree murder on the grounds that the statutes under which the indictment was presented are unconstitutional. Among the reasons cited are, first, that the statutes provide for "cruel and/or unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution". (R22) Second, "that the use of the death penalty pursuant to Florida Statute 921.141 by the State of Florida, contravenes the Supreme Court's decision in Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972)".

(R23) The motion was denied. (R25)

On appeal, petitioner assigned as error the following:

The trial court's imposition of the death penalty constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments to the United States Constitution.

The trial court's imposition of the death penalty constituted the arbitrary infliction of punishment so as to deprive the defendant of life without due process of law, in contravention of the fourteenth amendment to the United States Constitution.

The trial court erred in imposing death sentence in that the intentional extinguishing of life does not comport with human dignity.

The trial court erred in imposing death sentence in that execution is a wantonly freakish, arbitrary and capricious punishment, by its nature irrevocable.

The trial court's imposition of the death penalty pursuant to FLA. STAT. §921.141 (1972) constituted cruel and unusual punishment and a denial of due process of law in contravention of the eighth and fourteenth amendments to the United States Constitution in that the trial judge had untrammelled discretion to impose life sentence which could not be reviewed, but instead imposed sentence of death.

Only after the trial judge decided to impose sentence of death, in the exercise of his unfettered discretion, did he justify the sentence in writing; and this procedure denied defendant due process of law in contravention of the eighth and fourteenth amendments to the United States Constitution.

Supplemental Assignments of Error Nos. 2, 3, 4, 5, 7, 8. (R614,615)

This issue was briefed, Proffitt v. State, Fla. Sup. Ct. No. 45,541, Appellant's Brief at 46-48, and the Florida Supreme Court rejected this claim:

Finally, as to Appellant's eleventh point, whether the death penalty is cruel and unusual punishment, we note that this argument is meant to preserve the point for appeal, however, we are bound by our earlier pronouncement in State v. Dixon, 283 So.2d 1 (Fla. 1973). Proffitt v. State, 315 So.2d at 467 (1975).



## REASONS FOR GRANTING THE WRIT

1. THE COURT SHOULD GRANT CERTIORARY TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF FIRST DEGREE MURDER UNDER THE LAW OF FLORIDA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

### A. The Perpetuation of Arbitrary Selectivity Under the New Florida Capital Punishment Statute

On June 29, 1972, this Court held that the death penalty could no longer be imposed under statutory schemes which permitted its arbitrary, rare, and irregular infliction. Furman v. Georgia, 408 U.S. 238 (1972). Shortly after Furman, the Florida legislature modified its death penalty statutes by enacting Florida Laws 1972, c. 72-724 (Special Session). The question presented here is whether the modifications wrought by the Florida legislature are substantial enough to meet the minimum requirements of Furman: that the most extreme penalty known to contemporary man be not exacted arbitrarily.

The new Florida law provides a bifurcated trial procedure for the administration of the death penalty. <sup>9/</sup> See generally State v. Dixon, 238 So.2d 1 (1973), attached as Appendix B, pp. 1b-27b, infra. After a verdict, finding, or plea of guilty to a "capital felony," a sentencing hearing is conducted before a judge and jury wherein.

"[e]vidence may be presented as to any matter that the court deems relevant to sentencing, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) [ (5) ? ] and (7) [ (6) ? ] of this section.

Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements." <sup>11/</sup>

<sup>9/</sup> Florida Statutes Annotated §775.082 (1974-1975 supp.) provides a possible death penalty for a "capital felony," to be administered pursuant to the sentencing procedure established by Fla. Stat. Ann. §921.141 (1974-1975 supp.). Florida law defines two "capital felonies": first degree murder, Fla. Stat. Ann. §782.04(1) (1974-1975 supp.), and rape committed by a defendant seventeen years of age or older upon a child under the age of eleven, Fla. Stat. Ann. §794.01 (1) (1974-1975 supp.).

<sup>11/</sup> This subsection prohibits, however, "the introduction of any evidence

Fla. Stat. Ann. §921.141 (1) (1974-1975 supp.).

After hearing the sentencing evidence, the jury is to "render an advisory sentence to the court, based upon the following matters:

- (a) Whether sufficient aggravating circumstances exist as enumerated . . . [in §921.141(5)];
- (b) Whether sufficient mitigating circumstances exist as enumerated in . . . [§921.141 (6)], which outweigh the aggravating circumstances found to exist, and
- (c) Based on these considerations, whether the defendant should be sentenced to life or death."

Fla. Stat. Ann. §921.141(2) (1974-1975 supp.). This sentencing recommendation is not required to be in writing, to reflect specific considerations of the statutory circumstances, to reveal the proportion of the jurors in favor of life or death, or to describe in any way the process whereby the jury arrived at its result. <sup>12/</sup> The "advisory sentence" does not bind the trial court for "[n]otwithstanding the recommendations of the majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death," Fla. Stat. Ann. §921.141 (3) (1974-1975 supp.). When the court imposes sentence, it must make a "specific written findings of fact" in support of the sentence "based upon the circumstances in [Fla. Stat. Ann. §921.141 (5), (6) (1974-1975 supp.)] . . . and upon the records of the trial and the sentencing proceedings." Fla. Stat. Ann. §921.141 (3) (b) (1974-1975 supp.); see State v. Dixon, supra, 283 So.2d at 8.

Each "judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida." Fla. Stat. Ann. §921.141 (4) (1974-1975 supp.). The statute provides no guidelines for this appellate scrutiny, and the scope of review is not clear. Executive discretion to grant or deny clemency in cases where a death sentence has been imposed remains unregulated by law.

<sup>11/</sup> (cont'd) secured in violation of the Constitutions of the United States or of the State of Florida."

<sup>12/</sup> Petitioner's jury returned a verdict which stated: "[a] majority of the jury advise the recommend to the Court that it impose the death penalty upon the defendant, CHARLES WILLIAM PROFFITT." R.535.

The discrepancy between the regularity and even-handedness constitutionally required in capital sentencing and the unpredictable arbitrariness which results from the modified Florida procedures can only be appreciated after analysis of the various selective mechanisms which operate before, during, and after sentencing of defendants charged with crimes potentially punishable by death. And despite the mandate of Furman, the present Florida capital punishment statute provides "no meaningful basis for distinguishing the few cases in which . . . [the death penalty] is imposed from the many cases in which it is not." Furman v. Georgia, supra, 408 U.S. at 313 (concurring opinion of Mr. Justice White).

#### 1. Pre-Sentence Selective Mechanisms

Arbitrary selection begins well before sentencing to spare a substantial portion of Florida capital defendants, although others similarly situated are ultimately sentenced to death. Several pre-sentence selective mechanisms combine to avert the death penalty from numerous capitally chargeable defendants, operating in a fashion that fails to assure the slightest semblance of regularity in the choice of those who will eventually suffer the extreme penalty.

##### i. Prosecutorial Discretion

In Florida, each state attorney must "appear in the circuit court within his judicial circuit, and prosecute or defend on behalf of the state all suits, applications, or motions, civil or criminal, in which the state is a party." Fla. Stat. Ann. §27.02. <sup>16/</sup> He consequently has broad and unreliable authority to make charging decisions and to initiate and terminate prosecutions. <sup>17/</sup> The State Attorney:

<sup>16/</sup> Cf. Fla. R. Crim.P. 3.115: "The state attorney shall provide the personnel or procedure for criminal intake in the judicial system." No further guidelines are established.

<sup>17/</sup> The statutes defining the powers of the State's Attorney are to be "liberally construed." Barnes v. State, 58 So.2d 157, 159 (Fla. 1952).

"[T]he constitution and statutes impose a duty upon the state attorney to prosecute in the circuit court any and all violations of the criminal laws of which that court has jurisdiction either upon his own information or upon indictment by the grand jury. If any indictment has not been found or any information filed for such an offense, then all indictable offenses triable within the county should be presented to the grand jury by the state attorney."

"[h]as been loosely referred to many times as a 'one-man grand jury'. And he is truly that. He is the investigatory and accusatory arm of our judicial system of government, subject only to the limitations imposed by the Constitution, the common law, and the statutes, for the protection of individual rights and to safeguard against the possible abuses of the far-reaching powers so confided."

Imperato v. Spicola, 238 So.2d 503, 506 (Fla. App. 1970).

"[W]ithin the limits of the constitution and applicable statutes all steps in the prosecution of persons suspected of crime are under . . . [the state attorney's] supervision and control."

Collier v. Baker, 155 Fla. 425, 20 So.2d 652, 653 (1945). <sup>18/</sup>

Although the Florida legislature could, pursuant to its authority to prescribe the "powers and duties" of the state attorney, Owens v. State, 61 So.2d 412, 414 (Fla. 1952); see also Johns v. State, 144 Fla. 256, 197 So. 791, 796 (1940), enact guidelines to specify when a capital indictment should be sought, it has not done so, and the prosecutor's power to seek or to forego capital indictments remains broadly discretionary:

"[w]here . . . [a state attorney's duty and authority require the examination of evidence in the determination of law and the fact before taking action thereon, his duty and authority is ordinarily not strictly ministerial, but may even be quasi-judicial or discretionary in its character." <sup>19/</sup>

Hall v. State, 136 Fla. 644, 187 So. 392, 398 (1939).

The state attorney can terminate a criminal action whenever he determines "that the prosecution is not justified." Barnes v. State, 58 So.2d 157, 159 (Fla. 1952). See generally Wilson v. Renfree, 91 So.2d 857, 859-860 (Fla. 1956). "[T]he State has a right to take a nolle prosequi at any time prior to the jury being sworn." State v. Sokol,

<sup>17/</sup> (cont'd) State v. Mitchell, 188 So.2d 684, 687, (Fla. App.), cert. discharged, 192 So.2d 281 (Fla. 1966). See also Smith v. State, 95 So.2d 525, 527 (Fla. 1957). Cf. Newton v. State, 178 So.2d 341, 344 (Fla. 1965).

<sup>18/</sup> All capital prosecutions in Florida must be initiated by indictment. Fla. Const. art. I, §15; Fla. R. Crim. P. 3.140 (a) (1) (1974-1975 supp.). Any grand jury, of course, has absolute discretion to indict or to refuse to indict regardless of the evidence presented to it.

<sup>19/</sup> Cf. Carlile v. State, 129 Fla. 860, 176 So. 862, 863 (1937): "The state attorney has a very broad discretion in examining witnesses. . . prior to indictment."



208 So.2d 156 (Fla. App. 1968), without consent of the trial court. <sup>20/</sup> When a state attorney retracts an indictment or information without the formal entry of a nolle prosequi, the charge may be refiled without securing judicial approval. <sup>21/</sup> State v. Wells, 277 So.2d 543, 654 (Fla. App. 1973); State v. Fattorusso, 228 So.2d 630, 632 (Fla. App. 1969); Wilk v. State, 217 So.2d 610, 612 (Fla. App. 1969). Under the state attorney's authority to "contract with a criminal for his exemption from prosecution," Ingram v. Prescott, 111 Fla. 320, 149 So. 369 (1933), he may file capital charges against one co-defendant but not against another equally culpable co-defendant. And the state attorney can seek a conviction for any lesser degree of a capital offense, Fla. R. Crim. P. 3.140(k)(6), or for "any lesser offense, which, although not an essential ingredient of the major crime, is spelled out in the accusatory pleading in that it alleges all of the elements of the lesser offense." State v. Anderson, 270 So.2d 353, 356 (Fla. 1972)

Furthermore, the state attorney's discretion to plea bargain -- a process by which an estimated ninety per cent of all criminal cases are resolved <sup>22/</sup> -- is utterly unfettered by the post-Furman capital punishment statute or by any other significant restrictions. Florida Rule of Criminal Procedure 3.170(g) (1974-1975 supp.) explicitly authorizes plea bargaining:

"[t]he defendant, with the consent of the court and of the prosecuting attorney, may plead guilty to any lesser offense than that charged which is included in the offense charged in the indictment or information, or to any lesser degree of the offense charged."

<sup>20/</sup> If such consent is not obtained and if the nolle prosequi is not made part of a formal judgement, the state attorney is not prevented from prosecuting a party in violation of the nolle prosequi agreement, however. Ingram v. Prescott, 111 Fla. 320, 149 So. 369, 370 (1933) (dictum).

<sup>21/</sup> Fla. R. Crim. P. 3.191 (1974-1975 supp.), setting forth certain provisions to assure criminal defendants a speedy trial, may limit the period in which an action can be refiled by the state attorney.

<sup>22/</sup> PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967)

Rule 3.171 (1974-1975 supp.) provides that "[t]he Prosecuting Attorney is encouraged to discuss and agree on pleas which may be entered by the defendant." Where plea bargaining precedes the filing of the charging paper, even the discretionary power of the trial court to supervise negotiated dispositions can be avoided. For in Florida, defendants have a legal right to plead guilty to a criminal charge, Canada v. State, 144 Fla. 633, 198 So. 220, 223 (1940); Eckles v. State, 132 Fla. 526, 180 So. 764, 766 (1938); and a trial court's power to reject a guilty plea is limited to those cases where the plea is 'not 'entirely voluntary by one competent to know the consequence,' or is 'induced by fear, misapprehension, persuasion, promises, inadvertence, or ignorance.'" Reyes v. Kelly, 224 So.2d 303, 305 Fla. 1969).

"A trial court is not authorized to arbitrarily refuse to accept an unqualified plea of guilty made by a defendant in a non-capital case for any other reason."

There is no more reason to allow such action by a trial judge than there is to allow a defendant to withdraw such a plea at his pleasure. If a trial judge has the discretion to refuse only for cause permission to withdraw a plea of guilty, he should not be allowed, without cause, to reject such a plea. The right to enter such a guilty plea should be no less sacred than the right to enter a plea of not guilty."

224 So.2d at 306. See Fla. R. Crim. P. 3.160(c) (1974-1975 supp.).

Plea bargaining is frequent in capital cases, and the Florida Supreme Court has stated that when a defendant "plead[s] guilty in order to escape the electric chair," he gets "what he bargained for -- a life sentence and . . . no right to complain." Lewis v. State, 98 So.2d 46, 47 (Fla. 1956). One observer has concluded that the prosecutor's decision whether to plea bargain in the case of a capitally charged defendant is "probably the most widely significant choice separating the doomed from those who . . . go to prison." <sup>23/</sup> But there exists no procedures to control the employment of differing standards for the acceptance of less-than-capital guilty pleas by different state attorneys or to monitor or correct the inconsistent or capriciously applied policy of an individual state attorney.

<sup>23/</sup> BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 43 (1974).

Without any guidance whatsoever, <sup>24/</sup> then, a state attorney is free to make the decision whether a capital charge will be sought and prosecuted. He may "without violating [his] trust or any statutory policy . . . refuse to [seek] the death penalty no matter what the circumstances of the crime." Furman v. Georgia, supra, 408 U.S. at 314 (concurring opinion of Mr. Justice White).

#### 11. Jury Discretion

Although express sentencing discretion is conferred upon the trial judge by Fla. Stat. Ann. §921.141 (1974-1975 supp.), see pp. 43-53 infra, the jury also has complete discretion to spare a capital defendant's life by convicting him of a lesser offense. Petitioner's jury, for example, was charged that it might convict him of first degree murder, second degree murder, third degree murder, manslaughter, assault with intent to commit felony, aggravated assault, assault and battery, or simple assault. These crimes range from a capital felony (first degree murder) to a second degree misdemeanor punishable by no more than sixty days imprisonment (simple assault).

Although the respective crimes are defined in terms of elements that are theoretically distinct and mutually exclusive, the imprecision of the definitions allow a jury wide latitude to shape its guilt verdict so as to avoid or permit the imposition of a death penalty at the sentencing stage. (Such action is made more likely when, as here, the jurors are informed on voir dire that a death penalty may be the result of a verdict of guilty of first degree murder.) For example, "premeditation" is an element of

<sup>24/</sup> Discretionary prosecution in Florida is even greater in cases involving juveniles (persons under age eighteen, Fla. Stat. Ann. §39.01 (1974-1975 supp.)). A "child of any age" charged with a crime punishable by death or by life imprisonment is subject to juvenile jurisdiction "unless and until an indictment on such charge is returned by the grand jury." Fla. Stat. Ann. §39.02(5)(c) (1974-1975 supp.). The juvenile court may also waive jurisdiction when there is probable cause to believe that a child fourteen years old or older has committed a felony. Fla. Stat. Ann. §39.09(2)(a) (1974-1975 supp.); Fla. R. Juv. P. [Temp.] 8.110(b)(5). Thus, three seventeen year old children accused of first degree murder (Fla. Stat. Ann. 782.04(1) (1974-1975 supp.)) or the rape of a child under eleven (Fla. Stat. Ann. §794.01(1) (1974-1975 supp.)) might be prosecuted in three totally different ways: the first child could be indicted and tried on a capital charge; the second child could be "waived" to adult court and tried there for non-capital rape or a non-capital degree of homicide; the third child could be tried in a delinquency proceedings in juvenile

first degree (but not of second degree) murder:

"[a] premeditated design to effect the death of a human being is a fully formulated and conscious purpose to take human life, formed upon reflection and deliberation, entertained in the mind before and at the time of the homicide. The law does not prescribe the precise period of time which must elapse between the formation of and the execution of the intent to take human life in order to render the design a premeditated one; it may exist only a few moments and yet be premeditated. If the design to take human life was formed a sufficient length of time before its execution to admit of some reflection and deliberation on the part of the party entertaining it, and the party at the time of the execution of the intent was fully conscious of a settled and fixed purpose to take the life of a human being, and of the consequences of carrying such a purpose into execution, the intent or design would be premeditated within the meaning of the law although the execution followed closely upon formulation of the intent."

McCutchen v. State, 96 So.2d 152, 153 (Fla. 1957). See also Purkhiser v. State, 210 So.2d 448, 449 Fla. 1968; Mackiewicz v. State, 114 So.2d 684, 691 (Fla. 1959); Polk v. State, 179 So.2d 236, 237 (Fla. App. 1965).

"Premeditation may be inferred from evidence as to the nature of the weapon used, the manner in which the murder was committed and the nature and manner of the wounds inflicted."

Hernandez v. State, 273 So.2d 130, 133 Fla. App. 1973). See also Larry v. State, 104 Fla. 520, 140 So. 309, 310 (1932). Or it may not be so inferred.

For second degree murder (but not for manslaughter), <sup>26/</sup> the State must establish that a defendant acted with a "depraved mind regardless of human life":

"[d]epravity of mind is an inherent deficiency of moral sense and rectitude . . . It is the equivalent of the statutory phrase 'depravity of heart' which has been defined to be the highest grade of malice. . .

<sup>24/</sup> (cont'd) court. As in adult cases, the prosecutor has unfettered discretion to press, or to decline to press, for an indictment or waiver. See Johnson v. State, 314 So.2d 573 (Fla. 1975).

<sup>26/</sup> The crime of third degree murder in Florida is not, in terms of its elements, an intermediate offense between manslaughter and second degree murder. Third degree murder is instead a felony murder committed "without any design to effect death" in which the predicate felony is not arson, rape, robbery, burglary, kidnapping, aircraft piracy, or "the unlawful throwing, placing, or discharging of a destructive device or bomb." Fla. Stat. Ann. §782.04(3) (1974-1975 supp.) See Johnson v. State, 91 So.2d 185, 187 (Fla. 1956); Grimes v. State, 64 So.2d 920, 921 (Fla. 1953); Tilman v. State, 81 Fla. 558, 88 So 377, 378, (1921).



It is obvious . . . that the phrase "evincing a depraved mind regardless of human life", as used in the statute . . . denouncing murder in the second degree, was not used in the legal or technical sense of the word 'malice' in the popular or commonly understood sense of ill will, hatred, spite, an evil intent. It is the malice of the evil motive which the statute makes an ingredient of the crime of murder in the second degree."

Ramsey v. State, 114 Fla. 776, 154 So. 855, 856 (1934).<sup>27/</sup> See also Huntley v. State, 66 So.2d 504, 507 Fla. 1953); Luke v. State, 204 So.2d 359, 362 (Fla. App. 1967); Darty v. State, 161 So.2d 864, 873 (Fla. App. 1964); Smith v. State, 282 So.2d 179, 180 (Fla. App. 1973);<sup>28/</sup> Bega v. State, 100 So.2d 455, 457 (Fla. App. 1958).

<sup>27/</sup> Ramsey v. State, *supra*, *ibid.*:

"[h]owever, severe the criticism may be of the conduct of the accused in killing young Ellis, it cannot be justly said that it proceeded from an evil motive, from ill will, hatred or spite. It may have sprung from a flame of hottest indignation, outraged decency, humiliating insult, produced by a drunken vulgarian's obscene conduct toward the daughter of his host, but emotions of that kind cannot properly be said to be the product of an evil mind, a vicious corrupt, base perverse, malicious motive which may be said to characterize a 'depraved mind regardless of human life.'"

<sup>28/</sup> In this case, the Court of Appeals approved the following jury instruction:

"[a]n act is one imminently dangerous to another and evincing a depraved mind regardless of human life if it is an act which

1. a person of ordinary judgment would know is reasonably certain to kill or do serious bodily injury to another
2. is done from ill-will, hatred, spite or evil intent, and
3. is of such a nature that the act itself indicates an indifference to human life."

282 So.2d at 180.

The line separating first degree felony-murder and second degree felony-murder is also extremely unclear. The statute provides that first-degree murder is a murder "committed by a person engaged in the perpetration of, or in the attempt to perpetrate" any of eight designated felonies. Fla. Stat. Ann. §782.04(1)(a) (1974-1975 supp.) The same statute provides, however, that second degree murder is a murder "committed in the perpetration of, or in the attempt to perpetrate" seven of the eight felonies designated in §782.04(1)(a). Fla. Stat. Ann. §782.04(2) (1974-1975 supp.). By not distinguishing between the two degrees of felony-murder, the statute fails to guide the jury in determining whether a felony murder should be characterized as capital. The statute thus "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." Grayned v. Rockford, 408 U.S. 104, 108-109 (1972). See also Smith v. Goguen, 415 U.S. 566, (1974); Connally v. General Construction Company, 269 U.S. 385, 391 (1926); and cases cited in Grayned v. Rockford, *supra*, 408 U.S. at 108 n.4.

"[T]he statute is inherently defective in that the distinctions between first and second degree murder are so ambiguous as to make it impossible for grand juries, petit juries and judges to distinguish the difference. As written, the effect of these statutory provisions is that one who illegally causes the death of another while committing certain other felonies may be guilty of first degree murder, while, in another trial, one who causes death to another under exactly the same circumstances may be guilty of second degree murder."

State v. Dixon, *supra*, 283 So.2d at 26-27 (dissenting opinion of Mr. Justice Boyd) (footnote omitted).

The majority of the Florida court rejected this vagueness claim and purported to restrict the legal meaning of the statutory language.

The court reasoned:

"[t]he trial judge in State v. Dixon held that the distinction between the two sections of the murder statute was illusory, and that one charged with one of the crimes could interchangeably be charged with the other at the whim of the grand jury. We disagree, and hold that the statute does establish two separate and easily distinguishable degrees of crime, depending upon the presence of the defendant as a principal in the first or second degree.

Under the prior Fla. Stat. §782.04, F.S.A. (amended effective December 8, 1972), the distinction was not present, and Fla. Stat. §776.011, F.S.A., provides,

'Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, is a principal in the first degree and may be charged, convicted and punished as such, whether he is or is not actually or constructively present at the commission of such offense.'

The effect of this law was that the traditional definitions of principal in the first degree, principal in the second degree, and accessory before the fact were all combined within the statutory definition of principal in the first degree in Fla. Stat. §776.011, F.S.A., and in the repealed Fla. Stat. §782.04, F.S.A.

The obvious intention of the Legislature in making this change is to resurrect the distinction between principals in the first or second degree on the one hand and accessories before the fact on the other, in determining whether a party to a violent felony resulting in murder is chargeable with murder in the first degree or murder in the second degree. As to the distinction in any particular case, we need but refer to the rich heritage of case law on the distinction between principals in the first or second degree and accessories before the fact.

State v. Dixon, supra, 293 So.2d at 11. See also Alford v. State, 29/ No. 44,647 (Jan. 29, 1975) (slip op. at 4) (App. D, infra, at 4d).

The Florida Supreme Court's effort to rationalize Florida's felony murder provision is wholly unsuccessful, <sup>30/</sup> since the distinction between principals in the first or second degree and accessories before the fact provides no meaningful restriction of the jury's discretion to convict for either first or second degree murder in any particular case.

<sup>29/</sup> The Dixon court surmised that the "obvious intention" of the Florida Legislature in enacting the present murder statute was to "resurrect the distinction between principals in the first or second degree on the one hand and accessories before the fact on the other" (State v. Dixon, supra, 283 So.2d at 11) which the legislature had abolished in 1957. See Fla. Stat. Ann §776.011 (1973). However, the Florida legislature subsequently amended the elements of second degree felony-murder so that the crime occurs when a person is killed in the perpetration of the enumerated felonies "by a person other than the person engaged in the perpetration of or in the attempt to perpetrate" the felonies. Florida Laws 1974, c. 74-383, §14. See note 1 supra. The legislature thereby rejected the Florida Supreme Court's theory of principals and addressed itself to felony-murder situations involving death caused by a police officer, victim, or bystander reacting to the underlying felony.

<sup>30/</sup> A state court's construction of a statute can restrict its facial vagueness sufficiently to pass constitutional muster. See, e.g. Wainwright v. Stone, 414 U.S. 21 (1973). Nonetheless, a state court's

Every defendant charged with first degree murder may request that his jury be instructed of its power to convict him alternatively of second degree or third degree murder:

"[i]f the indictment or information charges an offense which is divided into degrees, without specifying the degree, the jurors may find the defendant guilty of any degree of the offense charged; if the indictment or information charges a particular degree the jurors may find the defendant guilty of the degree charged or of any lesser degree. The court shall in all such cases charge the jury as to the degrees of the offense.."

Fla. R. Crim. P. 3.490 (1974-1975 supp.). <sup>32/</sup> A trial court's refusal to grant a lesser-degree instruction is reversible error. Little v. State, 206 So.2d 9, 10 (Fla. 1968); Bailey v. State, 224 So.2d 296, 299 (Fla. 1969).

Moreover, a defendant charged with first degree murder may, as in this case, have his jury instructed on other non-capital offenses which are not lesser degrees of homicide but which are "necessarily included" in charges of first degree murder:

"[u]pon an indictment or information upon which the defendant is to be tried for any offense the jurors may convict the defendant . . . of any offense which is necessarily included in the offense charged. The court shall charge the jury in this regard."

Fla. R. Crim. P. 3.510 (1974-1975 supp.). <sup>34/</sup>

<sup>30/</sup> (cont'd) effort to save a facially vague statute is reviewable, and if its construction fails to refine or narrow ambiguous language, the construction is inadequate. See Lewis v. New Orleans, 415 U.S. 130 (1974); Winters v. New York, 333 U.S. 507 (1948).

<sup>32/</sup> This rule became effective on February 1, 1973; its predecessor was the identically worded Fla. Stat. Ann. §919.14 (1969).

<sup>34/</sup> This rule became effective on February 1, 1973; its predecessor was the almost identically worded Fla. Stat. Ann. §919.16 (1969). A trial judge has some discretion to deny a "necessarily included" instruction:

"[t]his . . . category comprehends those offenses which may or may not be included in the offense charged, depending upon, (a) the accusatory pleading, and (b) the evidence at the trial. In this category, the trial judge must examine the information to determine whether it alleges all of the elements of a lesser offense, albeit such lesser offense is not an essential ingredient of the major offense alleged. If the accusation is present, then the judge must determine from the evidence whether it supports the allegation of the lesser included offense. If the allegata and probata are present then there should be a charge on the lesser offense."

Brown v. State, 206 So.2d 377, 383 (Fla. 1968) (emphasis in original).



This, then, is the first -- but not the last -- trial process operating under Florida law to spare the lives of some capital defendants while consigning an arbitrarily selected group of other capital defendants to death.<sup>35/</sup>

## 2. Sentencing Discretion

The post-Furman Florida capital punishment statute, however, does not purport to make death the "mandatory" punishment for any particular crime. Instead, after a defendant has been convicted of a capital crime, the trial court has effective discretion to impose a sentence of life imprisonment or death in any case. This sentencing scheme confirms rather than eliminates the arbitrary selectivity declared unconstitutional in Furman v. Georgia. As Mr. Justice Ervin, dissenting from the Florida Supreme Court's decision upholding the constitutionality of the statute, pointed out:

" 'all past efforts "to identify before the fact" the cases in which the penalty is to be imposed have been "uniformly unsuccessful" . . . . One problem is that "the factors which determine whether the sentence of death is the appropriate penalty in particular cases are too complex to be compressed within the limits of a simple formula . . . ." Report of the Royal Commission on Capital Punishment, 1949-1953, Cmd. 8932, §498 [p. 174] (1953). As the Court stated in McGautha, [McGautha v. California, 402 U.S. 183 (1971)] "[t]he infinite variety of cases and facets to each case would make general standards either meaningless 'boiler-plate' or a statement of the obvious that no jury would need." 402 U.S., at 208, 91 S.Ct., at 1468 . . . . Thus, unless the Court in McGautha misjudged the experience of history, there is little reason to believe that sentencing standards in any form will substantially alter the discretionary character of the prevailing system of sentencing in capital cases.' "

State v. Dixon, supra, 283 So.2d at 17 (footnote omitted)

(quoting the dissenting opinion of Mr. Chief Justice Burger, Furman v. Georgia, supra, 408 U.S. at 401).

<sup>35/</sup> Other discretionary jury decisions may also spare the life of a capital offender. A jury may convict of a non-capital attempt, Fla. R. Crim. P. 3.510 (1974-1975 supp.); it may recognize an amorphously defined defense such as insanity, see, e.g., Davis v. State, 44 Fla. 32, 32 So. 822 (1902); Perry v. State, 142 So.2d 528 (Fla.App. 1962), or self-defense, see, e.g., Linsley v. State, 88 Fla. 135, 101 So. 273 or mitigation such as intoxication, see e.g., Gardner v. State, 28 Fla. 113, 9 So. 835 (1891); it may find that a homicide is justifiable, see Fla. Stat. Ann. §782.02 (1974-1975 supp.); or excusable, see Fla. Stat. Ann. §782.03 (1965); or it may simply refuse to convict in spite of the evidence -- a not infrequent phenomenon when the death penalty is involved, see Knowlton, Problems of Jury Discretion in Capital Cases, 101 U. PA. L. REV. 1009, 1012 n.18 (1953).

The trial judge, rather than the jury, makes the final determination of the sentence to be imposed on a capital offender. But his discretion is no less absolute or arbitrary than was the jury's under Florida's former procedure.<sup>36/</sup> The provision for an advisory jury verdict here merely introduces additional uncertainties into the sentencing procedure.<sup>37/</sup> The trial judge is clearly supposed to consider the advisory verdict, yet the statutes does not specify what weight he is to give it or what circumstances the jury's recommendation may be overruled. Since the jury does not return a written verdict specifying the aggravating and mitigating circumstances it has considered and found, it is impossible for a trial court to relate the verdict to the sentencing scheme outlined by the new Florida statute.<sup>38/</sup> The jury's sentencing recommendation is

<sup>36/</sup> This Court has already made clear that the principles of Furman applies to sentencing by judges as well as by juries. See e.g., Alvarez v. Nebraska, 408 U.S. 939 (1972); Miller v. Maryland, 408 U.S. 934 (1972); Steigler v. Delaware, 408 U.S. 939 (1972).

<sup>37/</sup> "In point of fact, a death sentence could be imposed although the entire twelve member jury had recommended a life sentence. Likewise, the judge could impose a life sentence although the entire jury had recommended death.

Under the old system, a majority of the twelve member jury jury, in the exercise of their discretion, determined the nature of the punishment. Under the new law, to the exercise of that discretion is added the opportunity for the arbitrary, completely unfettered, and final exercise of discretion by the judge. Clearly, the new law provides for even more discretion than the quantum thereof condemned in Furman."

State v. Dixon, supra, 283 So.2d at 26 (dissenting opinion of Mr. Justice Boyd).

"[T]he provision for a jury recommendation in the Florida Capital Punishment Act introduces unnecessary discretion into the sentencing procedure because the statute gives no guidance regarding the advisory sentence's relevance. Apparently, the trial judge should give great weight to the advisory sentence, but this is not clear from the statute. If the legislature did not intend the advisory sentence to be important, then the jury's participation in the sentencing hearing would be senseless and expensive extravagance. The further provision that a penalty jury be empaneled, even if there was no jury at the guilt trial, does seem to indicate that the legislature intended the trial judge to pay deference to the jury's recommendation. Regardless of the weight that the legislature intended the trial judge to give to the jury advisory sentence, however, there is another reason why the advisory sentences are problematic: they do not report the jury's underlying reasons for the sentencing decision reached."

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an enigmatic "yes" or "no" on the question whether a capital defendant should be killed, and the trial judge must speculate to divine the underlying basis of the verdict.<sup>39/</sup>

Moreover, the statutory aggravating and mitigating circumstances are extremely vague and susceptible to varying application by various jurors and trial judges. Determinations that "[t]he capital felony was especially heinous, atrocious or cruel," that "[t]he defendant has no significant history of prior criminal activity," that "[t]he defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor,": that "[t]he defendant knowingly created a great risk of death to many persons," that "[t]he defendant acted under extreme duress or under the substantial domination of another person,": that "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired," and that "[t]he age of the defendant at the

38/ (con't) Note, Florida's Legislative and Judicial Responses to Furman v. Georgia: An Analysis and Criticism, 2 FLA. ST. L. REV. 108, 144 (1974) (footnotes omitted).

39/ In Taylor v. State, 294 So.2d 648 (Fla. 1974), for example, neither the trial judge nor the Florida Supreme Court undertook to fathom the jury's verdict -- the trial judge disregarding it and the Supreme Court following it with equally scant analysis of its meaning, its supportability, or the weight to be given to it. The Taylor decision itself does nothing to clarify the respective sentencing roles of the jury and the trial judge; the Florida Supreme Court there merely declares:

"[w]e are not unmindful that the trial judge heard all the evidence offered during the trial and that at the second hearing no additional evidence was advanced in aggravation, nor in mitigation. However, his immediate rejection of the jury's recommendation upon its return to the courtroom does not comport with the intent of the legislation."

294 So.2d at 651. See also LaMadline v. State, 303 So.2d 17, 20 (Fla. 1974), quoted at p.61 infra.



time of the crime"<sup>40/</sup> should be considered a "mitigating circumstance" can obviously not be made with any precision, uniformity, or predictability.<sup>41/</sup> The very effort of the the Florida Supreme Court to clarify these provisions illustrates this difficulty:

"[t]he use of the adjectives 'great' and 'many' is attacked as vague, but we feel that a man of ordinary intelligence and knowledge easily conceives the concepts involved.

The aggravating circumstance which has been most frequently attacked is the provision that commission of an especially heinous, atrocious or cruel capital felony constitutes an aggravated capital felony. Fla. Sta. §921.141(6)(h), F.S.A. Again, we feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended. It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim."

<sup>40/</sup> In State v. Dixon, supra, 283 So.2d at 10 (emphasis supplied), the Florida Supreme Court explicated this provision in the following fashion:

"the Legislature has chosen to provide for consideration of the age of the defendant--whether youthful, middle aged, or aged--in mitigation of the commission of an aggravated capital crime. The meaning of the Legislature is not vague, and we cannot say that such a consideration is unreasonable per se. Any inappropriate application by a jury of the standard under the facts of a particular case may be corrected by the Court."

The Court did not, however, define the age "standard" or describe the manner in which it would "correct" "inappropriate applications" of this mitigating circumstance.

<sup>41/</sup> See Ehrhardt & Levinson, Florida's Legislative Response to Furman: An Exercise in Futility? 64 J. CRIM. L., CRIM. & POL. SCI. 10, 17-18 (1973).

State v. Dixon, supra, 283 So.2d at 9. The "norm of capital felonies," of course, is a standard comprised of all first degree murders and rapes of children below the age of eleven.

In this context, the breadth of the several statutory aggravating and mitigating circumstances is no less striking than their vagueness. Under Florida's sentencing "standards," any defendant convicted of a capital crime can plausibly be sentenced to death -- or alternatively to life imprisonment. As the Florida Supreme Court itself recognized: "[t]o a layman, no capital crime might appear to be less than heinous." State v. Dixon, supra, 283 So.2d at 8.<sup>42/</sup> To authorize the death penalty for a first degree murder (or rape of a child under the age of eleven) in terms of unmeasurable degrees of heinousness -- or of atrocity, or of cruelty -- therefore hardly constricts or controls the scope of sentencing discretion in any meaningful way.<sup>43/</sup>

<sup>42/</sup> To be sure, the Court's opinion proceeds to state that the trial judge's power to overrule the jury's recommendation will correct for laymen's outrage at capital crime:

"a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard [of] criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience."

State v. Dixon, supra, 283 So.2d at 8. As indicated above, however, the trial court's discretionary authority to overrule the jury appears to have increased rather than alleviated the harshness of jury verdicts, since in the cases of at least 16 of the inmates now on Florida's Death Row the sentencing jury recommended mercy but the trial judge imposed a death sentence.

<sup>43/</sup> In Spinkellink v. State, 313 So.2d 666 (Fla. 1975) the Florida Supreme Court affirmed a death sentence for first degree murder on the ground that a robbery-murder was "heinous, atrocious, or cruel." Defendant killed the deceased by shooting him twice with the deceased's pistol. As the majority opinion notes, the defendant had become aware of the deceased's "vicious propensities when the latter forced . . . [defendant] to have homosexual relations with him, when the latter played 'Russian Roulette' with him and boasted of killing a fellow inmate while in prison." Id. at 688. The

Although the Florida Supreme Court recently stated that "the propounding of aggravating and mitigating circumstances . . . must be determinative of the sentence imposed," Alford v. State, 307 So.2d 433 (Fla. 1975) (App. D, infra), see also State v. Dixon, supra, 283 So.2d at 8, it has held that the aggravating circumstances which justify a death sentence need not be those specified in §921.141. In Sawyer v. State, 313 So.2d 680 (Fla. 1975) (attached as App. C), the trial court overruled a jury recommendation of a life sentence and imposed a death sentence partially on the basis of information which had not been presented to the jury. The trial judge's opinion listed six "additional facts which the jury did not have during

43/ (con't) deceased took all of defendant's money, id., and defendant went to retrieve it. Defendant testified that he had been forced to kill the deceased in self defense when the latter attacked him. Id. "Admittedly, the evidence clearly shows that the deceased was an individual of vicious temperament." Id. at 670. Mr. Justice Ervin summarized in dissent:

"[i]n this case it appears that Appellant at the time of the homicide was a 24-year-old drifter who picked up Szymankiewicz [the deceased], a hitchhiker. Both had criminal records and both were heavy drinkers. Szymankiewicz, the victim in this case, was a man of vicious propensities who boasted of killings and forced Appellant to have homosexual relations with him. Appellant discovered that Szymankiewicz had 'relieved him of his cash reserves.'

It was under these conditions that Appellant returned to the motel room where the homicide occurred. Appellant testified he shot Szymankiewicz in self defense. Evidence to the contrary was only circumstantial. In fact, only through such evidence was it possible to infer the crime was premeditated and different from Appellant's direct testimony that he shot Szymankiewicz in self defense. The reasoning of this Court on the suddenness in which premeditation may be formed is suspect and allowed the prosecution undue latitude to readily shift from the theory of felony murder to premeditated murder.

It does not appear to me that in this situation there was sufficient certainty of premeditated guilt and heinousness to warrant the death penalty. When the nature of the relation between Appellant and Szymankiewicz is taken into account, along with the viciousness of the victim's character and this theft of Appellant's money, it is obvious that hostility existed between them that could have produced a mortal encounter that involved self-defense shooting." Id. at 671-675.

their deliberation on the advisory sentence,; Sawyer, at 681 3c, to justify imposition of the death sentence. The Florida Supreme Court recast these findings in terms of "aggravating circumstances" (although not "aggravating circumstances" iterated in §921.141) and affirmed appellant Sawyer's death sentence:

"[w]e find that the aggravating circumstances including (1) the facts of the armed robbery incident; (2) the prior record, including the commission of multiple robberies; (3) the fact that the appellant was a hard drug user, requiring the expenditure of \$200.00 per day; and (4) the specific finding of threats and reprisals against persons involved in the trial and prosecution of the appellant and the appellant's violent temper, taken together, are more than adequate to justify the imposition of the death penalty in this cause."

Sawyer, at 682. The number of factors in aggravation and mitigation which the jury and trial judge may consider is thus unlimited. Section 921.141 does "no more than suggest some subjects for the jury to consider during its deliberations." McGautha v. California, 402 U.S. 183, 207 (1971).

Ultimately, the manner of weighing the statutory factors and determining their "sufficiency" is left to the undirected discretion of jurors and trial judges.

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"The majority in Dixon stated that 'the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances' . . . . [283 So.2d at 10] But if it is not a counting process, what is it? Without some legislative formulation of the combination of circumstances that justify executing or not executing a defendant, the decision to execute is a function of the sentencer's discretion and nothing more. There are three reasons why the mere requirement that the sufficiency of the aggravating and mitigating circumstances be weighed does not effectively limit the sentencer's discretion. First, nowhere in the statute is the meaning of the word 'sufficient' developed, yet it is obviously the core of the matter. Secondly, the statute fails to assign, or even indicate, the relative weights of the various enumerated circumstances. Finally, the statute does not ordain what combination of mitigating circumstances will outweigh what combination of aggravating circumstances." <sup>44/</sup>

<sup>44/</sup> Note, Florida's Legislative and Judicial Responses to Furman v. Georgia: An Analysis and Criticism, 2 FLA. ST. L. REV. 108, 139-140 (1974) (footnotes omitted). The Dixon majority did rule that aggravating circumstances must be proved by the State beyond a reasonable doubt. State v. Dixon, supra, 283 So.2d at 9. But it did not allocate or define the burden of proof with regard to mitigating circumstances, simply leaving the sentencer "free to exercise unguided discretion when finding mitigating circumstances." Note, supra, 2 FLA. ST. L. REV. at 141.

Since the permutations of appraising "aggravating" and "mitigating" factors are limitless, one trial judge may find a particular aggravating circumstance "sufficient" to outweigh three or four designated mitigating circumstances, while another judge may view the identical circumstances differently. The same -- or rationally undifferentiable -- facts may be treated as a sufficient basis for a death sentence in one courtroom, and as insufficient in another room or on another day. And one sentencer may find that "aggravating" circumstance A outweighs "mitigating" circumstance B in the light of other, nonstatutory circumstances that another sentencer would disregard or overlook, or which would cause another sentencer to come down on the side of life instead of death.

This procedure is utterly unfitted to "reserve [the] . . . application [of capital punishment] to only the most aggravated and unmitigated of [the] most serious crimes." State v. Dixon, supra, 283 So.2d at 7. Rather, the Florida legislature has authorized the infliction of the "sentence of death under [a] legal system that permit[s] this unique penalty to be . . . wantonly and . . . freakishly imposed"<sup>46/</sup> with only nominal reference to the ostensible statutory scheme of aggravating and mitigating circumstances.

### 3. Post-Sentence Selective Mechanisms

#### i. Appellate Review

Death sentences imposed under the new Florida statute are automatically reviewed by the Florida Supreme Court. Fla. Stat. Ann. §921.141(4) (1974-1975 supp.). As conceived in State v. Dixon, supra, this appellate review is intended to provide one of several "concrete safeguards beyond those of the trial system to protect [a defendant] . . . from death where a less harsh punishment might be sufficient." Id., 283 So.2d at 7.

<sup>46/</sup> Furman v. Georgia, supra, 408 U.S. at 310 (concurring opinion of Mr. Justice Stewart).

"[T]he sole purpose of . . . [this review] is to provide the convicted defendant with one final hearing before death is imposed. Thus, it again presents evidence of legislative intent to extract the penalty of death for only the most aggravated, the most indefensible of crimes."

Id., 283 So.2d at 8. However, no statutory standards of appellate review are provided; and, in light of long-standing Florida traditions against appellate revision of substantive sentencing discretion, the scope of review by the Florida Supreme Court is exceedingly unclear. Without the articulation of any standards, the enunciation of a reasoned opinion on the sentencing question, a discussion of the factual elements justifying (or failing to justify) the sentence in the particular case, and an analysis of the sentence imposed in comparable cases,<sup>49/</sup> it is obviously impossible to ascertain whether or not the imposition and affirmance of a death sentence in a particular case is arbitrary and whether death is indeed being inflicted "for only the most aggravated, the most indefensible of crimes." State v. Dixon, at 7.

There is no appellate review of a trial judge's imposition of a life sentence in a capital case. Even if this sentence is arbitrary, atypical, or discriminatory, it cannot be modified on appeal. Consequently, another "infirmity in Florida's appellate review provision is that review by the supreme court cannot protect against arbitrary mitigation of the death penalty at the trial court level . . . . [E]ven if all those executed are found by the supreme court to be guilty of the most

<sup>49/</sup> As the Florida Supreme Court noted in State v. Dixon, *supra*, 283 So.2d at 8: "[c]ases involving life imprisonment are not . . . directly reviewable by [the Florida Supreme] . . . Court, and the District Courts of Appeal [are] . . . not . . . empowered to overturn the trial judge on the issue of sentence." Cases appealed to the Florida Supreme Court will therefore provide no reliable guide to whether the death penalty is being uniformly imposed under similar factual circumstances, since cases involving a sentence of life imprisonment may never be reviewed at all in that Court. Moreover, neither the Florida Supreme Court or the Court of Appeal is authorized to impose a death sentence or to vacate a life sentence and remand for resentencing in the event a life sentence is irrationally or arbitrarily imposed.

'aggravated' and 'indefensible' crimes, some of those spared at the trial court level may also be guilty of that same quality of criminal activity."<sup>50/</sup> pretermittting, then, the question whether appellate review of any sort could save unregulated and arbitrary trial-level death-sentencing decisions from the ban of Furman,<sup>51/</sup> it is manifest that the sort of review provided and practiced under the present Florida statute is wholly ineffective for that purpose.<sup>52/</sup>

<sup>50/</sup> Note, Florida's Legislative and Judicial Responses to Furman v. Georgia: An Analysis and Criticism, 2 FLA. ST. L. REV. 108, 147 (1974) (footnotes omitted).

<sup>51/</sup> If the trial procedures afforded by the Florida capital punishment statute are arbitrary in violation of the Eighth Amendment rights of capital defendants, it is questionable whether any appellate procedures can rectify the error. "The law itself must save the parties' rights, and not leave them to the discretion of the courts as such." Louisville & Nashville Ry. Co. v. Central Stock Yards Co., 212 U.S. 132, 144 (1909). Five years later, Justice Holmes cited this quotation from the Central Stock Yards case and concluded: "[t]he point there was that a defect in a law could not be cured by precautions in a judgment." International Harvester v. Kentucky, 234 U.S. 216, 220 (1914).

<sup>52/</sup> Concurrently with Furman and upon its authority, this Court vacated numerous death sentences that had been reviewed by state appellate courts and sustained on the express ground that the facts and circumstances of the case warranted the extreme penalty. See, e.g., Alford v. Eymann, 408 U.S. 939 (1972) (see State v. Alford, 98 Ariz. 124, 402 P.2d 551, 557 (1965); Ariz. Rev. Stat., §13-1717); Hurst v. Illinois, 408 U.S. 935 (1972) (see People v. Hurst, 42 Ill.2d 217, 247 N.E.2d 614 (1969)); Alvarez v. Nebraska, 408 U.S. 937 (1972) (see State v. Alvarez, 182 Neb. 358, 154 N.W.2d 746, 748 (1967); Neb. Rev. Stat., §29-2308); Fesmire v. Oklahoma, 408 U.S. 935 (1972) (see Fesmire v. State, 456 P.2d 573, 586-587 (Okla. Ct. Cr. App. 1969)); Phelan v. Brierly, 408 U.S. 939 (1972) (see Commonwealth v. Phelan, 427 Pa. 265, 234 A.2d 540 (1967); cf. Commonwealth v. Hough, 358 Pa. 247, 56 A.2d 84, 85-86 (1948), with Commonwealth v. Edwards, 380 Pa. 52, 110 A.2d 216, 217 (1955)). The Court vacated death sentences coming from these States even though the same state appellate courts had a regular and recent practice of reversing death sentences when such sentences were found to be unwarranted upon a consideration of aggravating and mitigating circumstances. See, e.g., State v. Maloney, 105 Ariz. 348, 464 P.2d 793 (1970); People v. Crews, 42 Ill.2d 60, 347 N.E.2d 593 (1969); State v. Hall, 176 Neb. 295, 125 N.W.2d 100 (1964); Lewis v. State, 451 P.2d 399 (Okla. Ct. Crim. App. 1969); Commonwealth v. Green, 396 Pa. 137, 151 A.2d 241 (1959).



## ii. Executive Clemency

The Governor, with the "approval of three members of the cabinet" may by executive order commute a death sentence to a sentence of life imprisonment.<sup>53/</sup> Although Florida Governors must report their grants of clemency to the legislature,<sup>54/</sup> there are no standards whatsoever for the exercise of the commutation power. The reduction of a legally authorized sentence is committed to the unfettered discretion of the executive branch. Davis v. State, 123 So.2d 703, 711 (Fla. 1960); LaBarbara v. State, 63 So.2d 654, 655 (Fla. 1953); Johnson v. State, 61 So.2d 179 (Fla. 1952); Sawyer v. State, 148 Fla. 542, 4 So.2d 713 (1941); Chavigny v. State, 112 So.2d 910, 915 (Fla. App. 1959). The executive has "broad and wide discretion in . . . commuting punishments," Ex Parte White, 161 Fla. 85, 178 So. 876, 880 (1938) -- so much so that the Florida Supreme Court has declared unconstitutional a statute which required the Governor and his cabinet (who constituted the Board of Pardons under the 1885 Constitution) to afford clemency any time the Court affirmed a death sentence by an equally divided Court. Ibid. One study of clemency in capital cases between 1960 and 1962 revealed 9 executions and 3 commutations of death sentences to life imprisonment during this period.<sup>55/</sup> There appears no reason to assume that the 25% clemency rate is atypical or will decrease under the new Florida capital procedures; and doubtless, a significant albeit irrationally selected portion of

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<sup>53/</sup> Fla. Const. Art. 4, §8(a) (1968 rev.).

<sup>54/</sup> Fla. Stat. Ann. 940.01 (1973).

<sup>55/</sup> Note, Executive Clemency in Capital Cases, 39 N.Y.U. L. REV. 136, 191 (1964).

capital defendants will continue to be spared through the exercise of executive clemency.<sup>56/</sup>

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This analysis of Florida's post-Furman capital punishment procedure demonstrates that the arbitrary selectivity condemned in Furman has been carefully preserved by the State's new death penalty statute. Discretionary opportunities for imposition or avoidance of the extreme penalty are, in fact, as numerous and as unregulated as in the pre-Furman period. A substantial Eighth Amendment question of literally vital importance to petitioner is thus presented by the Florida Supreme Court's affirmance of his death sentence under the new statutory procedure.

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<sup>56/</sup> Another way in which the Governor may avoid or permit the imposition of a death sentence, quite separate from granting clemency, is provided by Fla. Stat. Ann. §922.07 (1973). If the Governor is informed that a condemned defendant "may be insane, he shall stay execution of the sentence and appoint a commission of three psychiatrists to examine the convicted person." §922.07(1). After receiving the commission's report, the Governor may determine "that the convicted person has the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him", §922.07(a) and issue a death warrant, or he may determine that the convicted person lacks this mental capacity, §922.07(3), and issue an order committing him to the state hospital for the insane. See Ex parte Chesser, 93 Fla. 291, 111 So. 720 (1927); Hysler v. State, 136 Fla. 563, 187 So. 261 (1939). This determination is committed entirely to the discretion of the Governor, and no provision is made for any participation by the condemned defendants (except for the representation by counsel during the psychiatric examination) or for judicial review of the Governor's decision. Since §922.07(4) provides that when a defendant "has been restored to sanity", he may be executed, the motivation of any "insane" condemned man to regain mental health appears highly questionable. Some might be sane enough to feign insanity and thus postpone electrocution. Others might be crazy enough to cure themselves into oblivion. The outcome in any particular case will, of course, be ultimately determined by the discretionary decision of the Governor.

CONCLUSION

Petitioner prays that the petition for a writ of certiorari be granted.

RESPECTFULLY SUBMITTED,

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Clearly, a municipality or other governmental authority in this state can properly condemn lands for parking facilities. Because of the possible consideration of respondent-Authority to lease the air rights above the parking facility for a shopping mall, the majority holds that this is the primary purpose for the project. There is no justification for that holding in the record. The record fails to show (a) any official action on the part of respondent to authorize a shopping mall; (b) any official action on the part of respondent to approve plans and specifications for a shopping mall; and (c) any official action on the part of respondent authorizing its officers and employees to enter into an agreement with private enterprise for the construction of a shopping mall. Even assuming that there were such authorization, I cannot understand the logic and reasoning which requires the project to be defeated for that reason. To do so is hypocritical. The majority is, in effect, saying it is all right to build a parking facility in the downtown area to serve 25 to 50 or more surrounding shops, but it is improper to build a parking facility which will serve not only the surrounding retail establishments but those retail establishments built on the deck of the parking facility and which would help pay for the facility. I see no difference. The purpose is to provide public parking for downtown retail establishments.

I further agree with the contention of the respondent that the successful collateral challenge made by the petitioner to the prior validation of the bonds for this project will cause confusion which will sweep the bond markets that deal in bonds of Florida communities, particularly those that are for downtown redevelopment purposes. The majority opinion, in effect, says that the bonds were improperly validated for a public purpose.

With reference to the appellate attorney's fees for the petitioners in this cause, it is my opinion that attorney's fees of this

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magnitude should not be considered summarily upon affidavits only.

I am further disturbed that the majority has allowed the petitioner to file as a para of the record in this cause a newspaper article published five months after the decision of the trial court and testimony of an appraiser which occurred not only subsequent to the trial court's order in this matter but subsequent to the Fourth District Court's opinion in this cause.

For the reasons expressed herein, I would deny the petition.



Charles William PROFFITT, Appellant,

STATE of Florida, Appellee.

No. 43541.

Supreme Court of Florida

May 23, 1975.

Rehearing Denied Aug. 13, 1975.

Cause came before the Supreme Court on direct appeal from death sentence imposed by the Circuit Court, Hillsborough County, Walter N. Burnside, Jr., J. The Supreme Court held that where conversation between defendant and his wife in mobile home was readily discernible in bedroom rented to witness and defendant either knew or should have known that he was going to be overheard, privileged character of communication between defendant and his wife was lost; that admission of witness' testimony did not violate hearsay rule; that trial court did not err in permitting counsel for prosecution to comment during closing argument on possible explanation for conflicting testimony dealing with shirts worn by appellant.

Affirmed.

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1. Witnesses  $\Rightarrow$  270(2)

In homicide case, refusal to allow defense counsel on cross-examination to pursue questions dealing with whether victim was dealer in marijuana and whether his death was result of those dealings was not improper, where counsel was not attempting to impeach or discredit witness and such testimony would have confused ultimate issue and impaired fairness of trial.

2. Criminal Law  $\Rightarrow$  1170½(1)

Any error in State's recalling witness who had stepped down was harmless, where witness had remained sequestered, he had not mingled with public generally and information solicited on recall was not critical to either State's case or prejudicial to defendant. West's F.S.A. §§ 59.041, 924.33.

3. Witnesses  $\Rightarrow$  184(1)

Generally, testimony of third party who overhears confidential communication is admissible.

4. Witnesses  $\Rightarrow$  188(1)

Privilege of nondisclosure between husband and wife attaches to conversation or communication itself and protects it from exposure in evidence, wherever or in whosoever hands it may be.

5. Witnesses  $\Rightarrow$  192(1)

Privilege of nondisclosure between attorney and client attaches to conversation or communication itself, and protects it from exposure in evidence whosoever or in whosoever hands it may be.

6. Witnesses  $\Rightarrow$  193

Where conversation between defendant and his wife in mobile home was readily discernible in bedroom rented to witness and defendant either knew or should have known that he was going to be overheard, privileged character of communication between defendant and his wife was lost and that privilege did not preclude admission in

murder case of witness' testimony that defendant had said that he had stabbed and killed a man during an attempted robbery and had beaten a woman.

7. Criminal Law  $\Rightarrow$  364(6)

Witness' testimony that she overheard defendant in conversation with another state that he had stabbed and killed a man during attempted robbery was within res gestae exception to hearsay rule, where it was made within 30 minutes after commission of homicide at time when defendant was making hasty preparations for leaving state.

8. Criminal Law  $\Rightarrow$  720(9)

In homicide case in which victim's wife described assailant as wearing white pin-striped shirt and defendant's drinking companion stated that defendant had been wearing a short-sleeved white shirt with emblem on night of killing, prosecutor was properly permitted to comment during closing argument on possible explanation of conflicting testimony dealing with shirt.

9. Criminal Law  $\Rightarrow$  351(3)

Generally, a defendant's leaving at time which could have been after crime, although at an unusual hour is, standing alone, no more consistent with guilt than with innocence.

10. Criminal Law  $\Rightarrow$  777

Court did not err in instructing jury on question of whether guilt could be inferred from flight, where in addition to flight itself there was uncontroverted, unimpeached testimony of witness that she overheard defendant state in conversation with his wife that he had stabbed and killed a man.

11. Criminal Law  $\Rightarrow$  722(2)

Comment made by prosecutor as to chance for rehabilitation of defendant charged with first-degree murder was not improper even though it was distasteful.

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James A. Gardner, Public Defender, and Robert T. Benton, II, Asst. Public Defender, for appellant.

Robert L. Shevin, Atty. Gen., and A. S. Johnston, Asst. Atty. Gen., for appellee.

## PER CURIAM.

This cause is before the Court on direct appeal from the recommendation and sentencing to death of the appellant, Charles William Proffitt, by the Circuit Court of Hillsborough County, Florida. We have jurisdiction pursuant to Article V, Section 3(b)(1), Florida Constitution.

The appellant was charged by a grand jury indictment with the murder in the first degree of Joel Ronnie Medgebow by stabbing.

The evidence produced at trial established that on the morning of July 10, 1973, at about 4:45 A.M., the decedent's wife, Patricia Kay Medgebow, was awakened, apparently by her husband's moaning. She saw her husband propped up on one elbow with what later was discovered to be a knife in his hand. Suddenly, a man jumped up and struck her in the face several times fleeing through the open sliding glass doors. Fingerprints were later found on the door, however, they did not match the appellant's prints. The decedent's wife gave a description of the assailant but, at trial, she was unable to identify the appellant as the man who struck her on the morning of the homicide. In her description of the assailant, she claimed that he was wearing a white pin-striped shirt and either brown or grey trousers. She stated that on the evening prior to the killing she had shared a marijuana cigarette with four other people.

The testimony of Michael Charles Seary, appellant's coworker, was presented to show that on the night preceding and during the morning prior to the homicide, the appellant and Seary had been out drinking until 3:30 or 3:45 A.M., and that the ap-

pellant had driven Seary home, had a brief conversation and left. Seary also stated that at the time, the appellant was wearing a short-sleeved, white Maas Brothers' shirt with a blue oval emblem over the left breast, and grey trousers.

Further testimony revealed that the appellant and his wife lived in a two-bedroom mobile home, renting the other bedroom to a Mrs. Mary Helen Bassett and her infant daughter. Mrs. Bassett testified that on the evening prior to the homicide she had waited up with the appellant's wife for his return until approximately 1:00 A.M., but finally retired prior to his arrival. Over defense counsel's objection, she testified that she was awakened about half past five on the morning of July 10, 1973, and overheard a conversation between the appellant and his wife. She admitted that she did not hear the complete unbroken conversation, hearing only intermittent segments. She stated that she heard the appellant say that he had stabbed and killed a man during an attempted robbery and that he had beaten a woman. Mrs. Bassett also stated that she had not seen the appellant during the conversation but that she had recognized his voice.

Mrs. Proffitt, appellant's wife, testified that on the evening prior to the homicide, her husband had gone to work dressed in a white Maas Brothers' shirt and grey pants and returned from work at about a quarter past five the next morning wearing the same shirt and pants but was at that time barefooted.

A droplet and a smear of human blood were found on the Maas Brothers' shirt, however, the quantity was insufficient to type. The blood found on the knife was shown to be the same type as that of the victim but no fingerprints were detectable.

Upon this evidence, the jury found the defendant guilty as charged. The second half of the bifurcated proceeding was held, at which time it was shown that the appellant had been convicted in 1967 of the

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crime of breaking and entering without permission. In addition, the evidence adduced at trial was reiterated and the jury then retired to consider the recommendation of sentence. Upon returning, the jury recommended that the death penalty be imposed. The trial judge then ordered a mental examination of the defendant to determine his mental condition then and at the time of the homicide. The examination revealed that at the time of the commission of the homicide, the appellant was not mentally impaired.

The trial judge then sentenced the appellant to death and this appeal ensued.

[1] Appellant has raised eleven points on appeal. Each shall be treated in the order presented. The first two points are devoid of merit. Appellant first contends that the court erred in refusing to allow defense counsel to pursue questions dealing with whether the victim was a dealer in marijuana and whether his death was a result of those dealings. It is clear from reading the record that counsel for the appellant was not attempting to impeach or discredit the witness but rather was taking an expedition into immateriality. The trial judge properly exercised the broad discretion allowed him by limiting the scope of cross-examination. *Baisden v. State*, 203 So.2d 194 (Fla.App.1967). There is no need to speculate as to the goal of the expedition, however, it is interesting to note that in viewing the evidence sought to be admitted, the only purpose which its introduction would serve would be the confusion of the ultimate issue and the impairment of the fairness of the trial.

[2] Appellant's second alleged error challenges whether the State may recall a witness after the witness has stepped down. The record reveals that the witness had stepped down but had remained sequestered and had not mingled with the public generally. Further, the information solicited upon recall was not critical to either the State's case or prejudicial to the

defendant. If any error has been committed, our review of the record clearly indicates that that error, if any, was harmless and within the purview of the statutes. (Fla.Stat., §§ 59.041 & 924.33, 1974).

Appellant's third and fourth points on appeal relate to the admissibility of the testimony of Mrs. Bassett and the challenged privileged character of the conversation she overheard between the appellant and his wife. Appellant first asserts that the record is devoid of any suggestion that either appellant or his wife had any indication that they were being overheard.

[3-5] The general rule, and clearly the weight of authority is to the effect that testimony of a third party who overhears a confidential communication is admissible. *Wigmore on Evidence*, Vol. VIII, § 2336. However, it has long been held in this State that privilege of non-disclosure between husband and wife and attorney and client attaches to the conversation or the communication itself, and protects it from exposure in evidence, whosoever or in whosoever hands it may be. *Mercer v. State*, 40 Fla. 216, 24 So. 154, 158 (1898). In *Schetter v. Schetter*, 239 So.2d 51 (Fla.App.1970), an attorney recorded a conversation he had with his client over the telephone, without telling the client until the end of the conversation. The attorney then gave the recording to a psychiatrist who later testified at a hearing which resulted in the appointment of a guardian ad litem for the client.

The thrust of the opinion in *Schetter*, reversing the admissibility of that testimony is the assertion basic to the attorney-client privilege, that is, that the communication in question must have been made in confidence. *Id.* at 52.

The question then in this case, however, is whether it can be determined from the record that the appellant and his wife knew or should have known that their privileged communication was being overheard or whether as the appellant asserts,

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that the record is devoid of any suggestion that the appellant or his wife had any indication that the privileged communication was being overheard. The testimony of the appellant's wife indicates that she was aware of Mrs. Bassett's presence in the trailer on the morning after the homicide. It is equally clear that the appellant knew that she was residing in the same trailer since Mrs. Bassett was paying one hundred dollars a month as rent on the room she and her infant daughter were occupying. Additionally, it is readily apparent from the record that the appellant and his wife were not attempting to keep their voices at an indiscernible level since it was their voices which must have awakened Mrs. Bassett in spite of the fact that her door was closed. The testimony of Mrs. Bassett also shows that after overhearing the conversation between the appellant and his wife, she also observed the appellant get in his car to leave. However, the testimony does not end there. It seems that after the appellant left, Mrs. Bassett emerged from her room and talked with the appellant's wife. Mrs. Proffitt expressed no surprise at seeing Mrs. Bassett nor admonished her not to reveal what she had overheard. Mrs. Proffitt clearly knew that Mrs. Bassett had overheard the conversation.

[6] In examining these facts in the light of the pronouncement in *Schetter*, it is clear that there was no attempt to make the communication in confidence. It was as if Mrs. Bassett, in the other room, was privy to the conversation. There is absolutely no testimony indicating that either the appellant or his wife made any attempt, no matter how little, to keep the conversation from being overheard. It is further clear from the testimony that conversations were readily discernible in other rooms and the appellant either knew or should have known that he was going to be overheard if he was speaking over a whisper. Therefore, the privileged character of the communication was lost when they were speaking in a manner and place where they had

a reasonable chance of being overheard, and they knew of that possibility at that time.

[7] Appellant also stated that the admission of Mrs. Bassett's testimony about what was said violates the hearsay rule. Upon close scrutiny, it is noted that the utterances of the appellant and his wife were made within thirty minutes after the commission of the homicide at a time when the appellant was making hasty preparations for leaving the State. It is, therefore, clear that the declaration is sufficiently contemporaneous with the event that it can be regarded as having been stimulated by the event and not by the declarant's deliberation and thus within the *res gestae* exception. *Lawrence v. State*, 294 So.2d 371 (Fla.App.1974); See: *Wharton's Criminal Evidence*, Vol. 2, § 297. By contrast, where the communication was heard through admitted eavesdropping by use of an extension telephone receiver without knowledge of either of the parties to the conversation, see *Horn v. State*, 298 So.2d 194 (Fla.App.1974).

[8] Appellant's fifth point relates to whether the court erred in permitting counsel for the prosecution to comment during closing argument on a possible explanation of the conflicting testimony dealing with the shirt worn by the assailant. This point has no merit since there were clearly facts in evidence tending to show that there was the possibility, however remote, of two different shirts having been involved, and the court correctly exercised its discretion in permitting the comment.

[9, 10] Appellant next raises the question of whether the court erred in instructing the jury on the question of whether guilt could be inferred from flight. The general rule in Florida as correctly pointed out by the appellant is to the effect that the defendant's leaving at a time which could have been after the crime, although at an unusual hour, is, when standing alone, no more consistent with guilt than

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with innocence. *Harrison v. State*, 104 So.2d 391 (Fla.App.1958).

However, in the case at bar, there exists significantly more evidence in the record than flight standing alone. There is the uncontroverted, unimpeached testimony of Mrs. Bassett. There is the phone call to the police by the defendant's wife and, finally, there is the flight itself. Thus, it is clear that under the facts in this case, the court was correct in instructing the jury on flight. See: *Williams v. State*, 268 So.2d 566 (Fla.App.1972).

The seventh point raised on appeal by the appellant deals with whether the court erred in instructing the jury on felony murder. Our review of the record indicates that the trial court correctly instructed the jury on the elements of the felony murder rule. The appellant seems to be challenging prosecution's commenting on felony murder. However, we can find no reversible error on this point.

[11] As to appellant's eighth, ninth and tenth points on appeal, we find no reversible error. The eighth point, dealing with the excusing of a juror because of preconceived notion about the death penalty, has been discussed and disposed of many times. *Campbell v. State*, 227 So.2d 873 (Fla. 1969) et seq. Point nine relates to another comment made by counsel for the prosecution as to the chance for the rehabilitation of the appellant. Although a distasteful comment, appellant has not cited any authority holding such comment error. The crime in this case is distasteful, but to some extent fair comment is distasteful. We, therefore, again find no reversible error.

Appellant's tenth point concerns whether the trial court did not consider evidence in mitigation when it sentenced the appellant to death. The trial court has carefully set forth all the circumstances in this case, to-wit:

#### "AS TO AGGRAVATING CIRCUMSTANCES:

(A) That the Defendant, CHARLES WILLIAM PROFFITT, murdered JOEL RONNIE MEDGELOW from a premeditated design and while the Defendant, CHARLES WILLIAM PROFFITT, was engaged in the commission of a felony, to-wit: burglary.

(B) That the Defendant, CHARLES WILLIAM PROFFITT, has the propensity to commit the crime for which he is convicted, to-wit: Murder in the First Degree and is a danger and menace to society.

(C) That the murder of JOEL RONNIE MEDGELOW by the Defendant, CHARLES WILLIAM PROFFITT, was especially heinous, atrocious and cruel.

(D) That the Defendant knowingly through his voluntary and intentional acts leading up to and during the course of the commission of the offense for which he was convicted created a great risk to serious bodily harm and death to many persons.

#### AS TO MITIGATING CIRCUMSTANCES:

The Court finds that the enumerated mitigating circumstances set forth in F. S. 921.141(6)(7) are primarily negated, in that:

(A) The Defendant, CHARLES WILLIAM PROFFITT, was convicted in 1967 of Breaking and Entering without permission.

(B) That the capital felony for which the Defendant, CHARLES WILLIAM PROFFITT, was convicted was not committed while the Defendant, CHARLES WILLIAM PROFFITT, was under the influence of extreme mental or emotional disturbance.

(C) That the victim, JOEL RONNIE MEDGELOW, was not a participant in the Defendant's conduct nor did the victim, JOEL RONNIE MEDGELOW, consent to the act.

(D) That the Defendant, CHARLES WILLIAM PROFFITT, was the only participant in the capital felony for which he has been convicted.

(E) That the Defendant, CHARLES WILLIAM PROFFITT, did not act under extreme duress during the commission of the offense nor was he, during that period of time under the substantial domination of another person.

(F) That at the time of the commission of the offense the Defendant's capacity to appreciate the criminality to the requirements of law was not substantially impaired.

(G) The age of the Defendant, CHARLES WILLIAM PROFFITT, to-wit: age 28 years, has no particular

significance and therefore is not a mitigating circumstance."

We must obviously conclude that no error was committed.

Finally, as to the appellant's eleventh point, whether the death penalty is cruel and unusual punishment, we note that this argument is meant to preserve the point for appeal, however, we are bound by our earlier pronouncement in *State v. Dixon*, 283 So.2d 1 (Fla.1973).

After carefully reviewing the record and briefs and after oral argument of the parties, we find that no reversible error has been shown and, therefore, the decision of the circuit court should be and is hereby affirmed.

It is so ordered.

ADKINS, C. J., ROBERTS, BOYD, McCAIN and OVERTON, JJ., and DUVALL, Circuit Judge, concur.

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# SOUTHERN REPORTER

VOLUME 233. SECOND SERIES



STATE of Florida, Appellant,

v.

Carl DIXON et al., Appellees.

STATE of Florida, Plaintiff,

v.

Samuel D. SETSER, Defendant.

STATE of Florida, Plaintiff,

v.

Fred Elson HUNTER and James Calvin Moore, Defendant.

STATE of Florida, Plaintiff,

Richard L. SHEPPARD, Defendant.

Nos. 43521, 43460, 43478 and 43473.

Supreme Court of Florida.

July 26, 1973.

Rehearing Denied Oct. 10, 1973.

Proceedings on appeal from Circuit Court, Dade County, Paul Baker, J., and certified questions from Circuit Courts of Orange County, Maurice M. Paul, J., Duval County, Everett R. Richardson, J., and Dade County, Gene Williams, J., involving validity of statute providing for death penalty. The Supreme Court, Adkins, J., held that statute imposing death penalty was valid, and that statutes defining first and

second-degree murder created two separate and distinct offenses.

Certified questions answered, decision reversed, and causes remanded.

Ervin, J., filed dissenting opinion.

Boyd, J., filed dissenting opinion.

## 1. Criminal Law §1219

United States Supreme Court decision holding unconstitutional certain state statutes authorizing death penalty did not abolish capital punishment.

## 2. Criminal Law §1206(1)

Mere presence of discretion in sentencing procedure cannot render procedure violative of United States Supreme Court decision invalidating certain state statutes imposing death penalty.

## 3. Criminal Law §1206(1)

Capital punishment is not, per se, violative of United States Constitution or Florida Constitution.

## 4. Criminal Law §1206(3)

Term "heinous" as used in statute defining aggravating circumstance authorizing death penalty means extremely wicked or shockingly evil. F.S.A. § 921.141.

See publication Words and Phrases for other judicial constructions and definitions.

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## 5. Criminal Law §1206(3)

Term "atrocious" as used in statute setting forth aggravating circumstance authorizing death penalty means outrageously wicked and vile. F.S.A. § 921.141.

See publication Words and Phrases for other judicial constructions and definitions.

## 6. Criminal Law §1206(3)

Term "cruel" as used in statute relating to aggravating circumstances authorizing death penalty means designed to inflict high degree of pain with utter indifference to, or even enjoyment of, suffering of others. F.S.A. § 921.141.

See publication Words and Phrases for other judicial constructions and definitions.

## 7. Homicide §18(1)

Statute which provided that murder committed in perpetration of or attempt to perpetrate any one of specified violent felonies was murder of second degree and statute which defined murder committed by person engaged in perpetration of or in attempt to perpetrate any of same violent felonies was murder in first degree established two separate distinguishable degrees of crime, depending on presence of defendant as principal in first or second degree. F.S.A. § 782.04(1)(a), (2).

## 8. Criminal Law §1206(1)

Florida statutes providing for imposition of death penalty in certain specified cases and providing procedure for determining whether death penalty should be imposed were constitutional. F.S.A. § 921.141.

Robert L. Shevin, Atty. Gen., Raymond L. Marky and George R. Grogan, Asst. Atty. Gen., for appellant and plaintiff.

Phillip A. Hubbard, Public Defender, Lewis S. Kimler and Bennett H. Brunner, Asst. Public Defenders, for appellee Dixon.

Leonard R. McMillen, of Stephens & McMillen, Miami, for appellee-Lester.

Ronald S. Guralnick, of Guralnick & Gellman, Miami, for appellee-Sawyer.

Louis R. Bowen, Jr. and Phillip A. Hubbard, Public Defenders, Warren H. Horton, Lewis S. Kimler and Bennett H. Brunner, Asst. Public Defenders, for defendant-Setser.

Louis O. Frost, Jr., Public Defender, and Charles C. Adams, Asst. Public Defender, for defendant-Hunter.

Elliot Zisser, of Zisser & Zisser, Jacksonville, for defendant-Moore.

Philip Carlton, Jr., Miami, for defendant-Sheppard.

Tobias Simon, Miami, Jack Greenberg, Jack H. Himmelstein, Elaine R. Jones, Lynn Walker, New York City, Anthony G. Amsterdam, Stanford, Cal., for amicus curiae N.A.A.C.P. Legal Defense and Educational Fund, Inc.

James T. Russell, Clearwater, and David H. Bludworth, West Palm Beach, for amicus curiae, Florida Pros. Attys. Ass'n, Inc.

ADKINS, Justice.

These cases pose several questions arising from the possibility of the imposition of the penalty of death pursuant to Fla. Stat. § 921.141, F.S.A., which became effective December 8, 1972.

Four cases are here consolidated on the issue of the constitutionality of the capital punishment statutes of the State of Florida. The case of State v. Setser is before this Court on the basis of a certified question from the Circuit Court of Dade County. The case of State v. Hunter and Moore is before this Court on the certified question of the Circuit Court for Duval County. The case of State v. Sheppard is before this Court on the certified question of the Circuit Court for Orange County. We have jurisdiction to determine the questions certified pursuant to Fla.Const.,

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art. V, § 3(b)(3), F.S.A. The case of State v. Dixon, Lester and Sawyer is before this Court on appeal from a decision of the Circuit Court for Dade County that Fla.Stat. §§ 775.082, 921.141, F.S.A., are unconstitutional. We have jurisdiction pursuant to Fla.Const., art. V, § 3(b)(1), F.S.A.

The question certified in the case of State v. Setser is:

"Whether the provisions of Chapter 72-724, Laws of Florida, 1972, prescribing the method and means of determining the penalty to be imposed in a capital case violates the Constitution of the State of Florida and the Constitution of the United States in light of the decision of the United States Supreme Court in the case of Furman v. Georgia, 408 U.S. 238, 32 [33] L.Ed.2d 346, 92 S.Ct. 2726 (1972), and the decision of the Supreme Court of Florida in Donaldson v. Sack, (Florida 1972), 265 So.2d 499."

In the case of State v. Hunter and Moore, the questions certified are:

- "1. Whether the new Florida Murder Statute, Ch. 72-724, Laws of Florida (1972) amending Florida Statute sections 782.04 and 921.141, is unconstitutionally vague in violation of the due process and equal protection guaranteed by the Constitutions of the United States and of the State of Florida because a grand jury when called upon to consider bringing an indictment would be unable to distinguish the language between Murder in the First Degree and Murder in the Second Degree.
- "2. Whether the new Florida Murder Statute, Ch. 72-724, Laws of Florida (1972), amending Florida Statute sections 782.04 and 921.141, is unconstitutionally vague in violation of the due process and equal protection guaranteed by the Constitutions of the United States and of the State of Florida because a trial

judge cannot determine what specific crimes are embodied within the divisions of Murder in the First Degree and Murder in the Second Degree in order to properly instruct a jury and conduct a trial under the requirements set forth by the Supreme Court of Florida in State v. Washington, 268 So.2d 901 (Fla. 1972)."

In the case of State v. Sheppard, the questions certified are:

"Whether the provisions of Florida Statutes 782.04, 775.082 and 921.141 prescribing the penalties for felonies and misdemeanors, the definitions of the degrees of murder and the methods and means of determining the penalty to be imposed upon conviction or adjudication of guilt of a defendant of a capital felony:

- "A. Is cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the Constitution of the United States?
- "B. Is an arbitrary infliction of punishment as to deprive the defendant of life, liberty or property without due process of law?
- "C. Is guided by insufficient and arbitrary standards which are vague, indefinite and uncertain as to be contrary to the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and Section 12 of the Declaration of Rights of the Constitution of the State of Florida?
- "D. Is vague, ambiguous and indefinite as to deprive the defendant of his right to know the nature of the charges, the differentiation between the degrees of homicide and to be able to prepare a defense accordingly?
- "E. Is placing upon the defendant the burden of proving mitigating circumstances in violation of his right

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against self-incriminating as provided in the Fifth Amendment to the Constitution of the United States?"

The statutes involved in the questions before this Court are Fla.Stat. §§ 775.082, 782.04, and 921.141, F.S.A. Fla.Stat. § 775.082, F.S.A., deals with penalties for criminal convictions and provides, in pertinent part:

"(1) A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than twenty-five (25) calendar years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in section 921.141 results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death."

Fla.Stat. § 782.04, F.S.A., the statute under which all the accuseds before this Court are charged, deals with the crime of murder and provides:

"(1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of seventeen (17) years when such drug is proven to be the proximate cause of the death of the user shall be murder in the first degree and shall constitute a capital felony, punishable as provided in § 775.082."

"(b) In all cases under this section the procedure set forth in section 921.141 shall be followed in order to determine sentence of death or life imprisonment."

"(2) When perpetrated by any act imminently dangerous to another, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual or when committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb, except as provided in subsection (1), it shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment in the state prison for life, or for such term of years as may be determined by the court."

"(3) When perpetrated without any design to effect death, by a person engaged in the perpetration of or in the attempt to perpetrate any felony, other than arson, rape, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb, it shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in section 775.082, section 775.083, or section 775.084." (Emphasis supplied)

Fla.Stat. § 921.141, F.S.A., provides the procedure to be followed in determining what penalty should be assessed following a conviction for a crime designated as a capital felony. It provides:

"(1) Upon conviction or adjudication of guilt of a defendant of a capital felony the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by section 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury empaneled for

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that purpose unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7) of this section. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements; and further provided that this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

"(2) After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court based upon the following matters:

"(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6), and

"(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh aggravating circumstances found to exist, and

"(c) Based on these considerations whether the defendant should be sentenced to life or death.

"(3) Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

"(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

"(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances. In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and based upon the records of the trial and the sentencing proceedings.

"(4) If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with section 775.082.

"(5) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Supreme Court.

"(6) Aggravating circumstances.—Aggravating circumstances shall be limited to the following:

"(a) The capital felony was committed by a person under sentence of imprisonment;

"(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person;

"(c) The defendant knowingly created a great risk of death to many persons;

"(d) The capital felony was committed while the defendant was arrested or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping,

aircraft piracy, or the unlawful throwing, placing or discharging of a destructive-device or bomb;

"(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

"(f) The capital felony was committed for pecuniary gain;

"(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws;

"(h) The capital felony was especially heinous, atrocious or cruel.

"(7) Mitigating circumstances.—Mitigating circumstances shall be the following:

"(a) The defendant has no significant history of prior criminal activity;

"(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

"(c) The victim was a participant in the defendant's conduct or consented to the act;

"(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

"(e) The defendant acted under extreme duress or under the substantial domination of another person;

"(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

"(g) The age of the defendant at the time of the crime." (Emphasis supplied)

The Supreme Court of the United States in *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed.2d 346 (1972), and subsequent decisions struck down the previously

existing death provisions of the several states with the possible exception "of a very few mandatory statutes" (See 408 U.S. 417, n. 2, 92 S.Ct. 2818), by holding:

"[T]he imposition and carrying out of the death penalty in [these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." (Emphasis supplied) (pp. 239-240, 92 S.Ct. p. 2727)

This is the only controlling law which *Furman v. Georgia*, *supra*, provides, as no more specific statement of the law could garner a majority of the members of the high court. It is not in the province of this Court to attempt to predict the future holdings of the Supreme Court of the United States and to attempt to weigh the laws of the State of Florida in light of the separate opinions of the five justices who constituted the majority in *Furman v. Georgia*, *supra*.

[1,2] Two points can, however, be gleaned from a careful reading of the nine separate opinions constituting *Furman v. Georgia*, *supra*. First, the opinion does not abolish capital punishment, as only two justices—Mr. Justice Brennan and Mr. Justice Marshall—adopted that extreme position. The second point is a corollary to the first, and one easily drawn. The mere presence of discretion in the sentencing procedure cannot render the procedure violative of *Furman v. Georgia*, *supra*; it was, rather, the quality of discretion and the manner in which it was applied that dictated the rule of law which constitutes *Furman v. Georgia*, *supra*.

Discretion and judgment are essential to the judicial process, and are present at all stages of its progression—arrest, arraignment, trial, verdict, and onward through final appeal. Even after the final appeal is laid to rest, complete discretion remains in the executive branch of government to honor or reject a plea for clemency. See Fla.Const., art. IV, § 8, F.S.A., and U.S. Const., art. II, § 2.

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Thus, if the judicial discretion possible and necessary under Fla.Stat. § 921.141, F.S.A., can be shown to be reasonable and controlled, rather than capricious and discriminatory, the test of *Furman v. Georgia*, *supra*, has been met. What new test the Supreme Court of the United States might develop at a later date, it is not for this Court to suggest.

As will be discussed hereafter, we have determined that each of the questions certified by the three circuit courts involved in the case *sub judice* must be answered in the negative, and the circuit court in the case of *State v. Dixon*, case No. 43,521, must be reversed.

[3] Capital punishment is not, *per se*, violative of the Constitution of the United States (*Furman v. Georgia*, *supra*) or of Florida. *Wilson v. State*, 225 So.2d 321 (Fla.1969).

Death is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation. It is proper, therefore, that the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes. In so doing, the Legislature has also recognized the inability of man to predict the myriad tortuous paths which criminality can choose to follow. If such a prediction could be made, the Legislature could have merely programmed a judicial computer with all of the possible aggravating factors and all of the possible mitigating factors included—with ranges of possible impact of each—and provided for the imposition of death under certain circumstances, and for the imposition of a life sentence under other circumstances. However, such a computer could never be fully programmed for every possible situation, and computer justice is, therefore, an impossibility. The Legislature has, instead, provided a system whereby the possible aggravating and mitigating circumstances are defined, but where the weighing process is left to the carefully scrutinized judgment of jurors and judges.

It is necessary at the outset to bear in mind that all defendants who will face the issue of life imprisonment or death will already have been found guilty of a most serious crime, one which the Legislature has chosen to classify as capital. After his adjudication, this defendant is nevertheless provided with five steps between conviction and imposition of the death penalty—each step providing concrete safeguards beyond those of the trial system to protect him from death where a less harsh punishment might be sufficient.

First, the question of punishment is reserved for a post-conviction hearing so that the trial judge and jury can hear other information regarding the defendant and the crime of which he has been convicted before determining whether or not death will be required. Both the State and the defendant are allowed to present evidence at the hearing, evidence which might have been barred or withheld from a trial on the issue of guilt or innocence.

The discretion of the trial judge in determining what evidence might be relevant to the sentence is not unbridled. It is merely a necessary power to avoid a needlessly drawn out proceeding where one party might choose to go forward with evidence which bears no relevance to the issues being considered. It is easily determined from the broadness of the statute that a narrow interpretation of the rules of evidence is not to be enforced, whether in regards to relevance or to any other matter except illegally seized evidence.

Another advantage to the defendant in a post-conviction proceeding, is his right to appear and argue for mitigation. The State can cross-examine the defendant on those matters which the defendant has raised, to get to the truth of the alleged mitigating factors, but cannot go beyond them in an attempt to force the defendant to prove aggravating circumstances for the State. A defendant is protected from self-incrimination through the Constitutions of Florida and of the United States. Fla.

Const., art. I, § 9, F.S.A., and U.S. Const., Amend. V. In no event, is the defendant forced to testify. However, if he does, he is protected from cross-examination which seeks to go beyond the subject matter covered on his direct testimony and extend to matters concerning possible aggravating circumstances.

The second step of the sentencing procedure is that the jury—the trial jury if there was one, or a specially called jury if jury trial was waived—must hear the new evidence presented at the post-conviction hearing and make a recommendation as to penalty, that is, life or death. With the issue of guilt or innocence disposed of, the jury can then view the question of penalty as a separate and distinct issue. The fact that the defendant has committed the crime no longer determines automatically that he must die in the absence of a mercy recommendation. They must consider from the facts presented to them—facts in addition to those necessary to prove the commission of the crime—whether the crime was accompanied by aggravating circumstances sufficient to require death, or whether there were mitigating circumstances which require a lesser penalty.

The third step added to the process of prosecution for capital crimes is that the trial judge actually determines the sentence to be imposed—guided by, but not bound by, the findings of the jury. To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience.

The fourth step required by Fla.Stat. § 921.141, F.S.A., is that the trial judge justifies his sentence of death in writing, to provide the opportunity for meaningful re-

view by this Court. Discrimination or capriciousness cannot stand where reason is required, and this is an important element added for the protection of the convicted defendant. Not only is the sentence then open to judicial review and correction, but the trial judge is required to view the issue of life or death within the framework of rules provided by the statute.

Review of a sentence of death by this Court, provided by Fla.Stat. § 921.141, F.S.A., is the final step within the State judicial system. Again, the sole purpose of the step is to provide the convicted defendant with one final hearing before death is imposed. Thus, it again presents evidence of legislative intent to extract the penalty of death for only the most aggravated, the most indefensible of crimes. Surely such a desire cannot create a violation of the Constitution.

We also consider it reasonable to require that a finding that life imprisonment be imposed rather than death should be supported in writing by the trial judge. This we do require under our constitutional power to regulate practice and procedure in the courts. Fla. Const., art. V, § 2(a), F.S.A.

Cases involving life imprisonment would not be directly reviewable by this Court, and the District Courts of Appeal would not be empowered to overturn the trial judge on the issue of sentence. However, requiring these findings by the judge provides an additional safeguard for the defendant sentenced to death in that it provides a standard for life imprisonment against which to measure the standard for death established in the defendant's case, and again avoids the possibility of discriminatory sentences of death.

The most important safeguard presented in Fla.Stat. § 921.141, F.S.A., is the propounding of aggravating and mitigating circumstances which must be determinative of the sentence imposed. It is argued that the circumstances are vaguely worded in some cases, and that they do not provide

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meaningful restraints and guidelines for the discretion of judge and jury. We disagree.

The aggravating circumstances of Fla. Stat. § 921.141(6), F.S.A., actually define those crimes—when read in conjunction with Fla.Stat. §§ 782.04(1) and 794.01(1), F.S.A.—to which the death penalty is applicable in the absence of mitigating circumstances. As such, they must be proved beyond a reasonable doubt before being considered by judge or jury.

Considered in that vein, Fla.Stat. § 921.141(6), subsections (a) and (b), F.S.A., prescribe the death penalty for a capital felony committed by a prisoner or by one previously convicted of a capital felony. These conditions represent two situations wherein the death penalty has been determined by the Legislature to be applicable, absent overriding mitigating factors.

Likewise, Fla.Stat. § 921.141(6)(c), F.S.A., provides the death penalty for one who is convicted of a capital felony in which he knowingly created a great risk of death to many persons. The use of the adjectives "great" and "many" is attacked as vague, but we feel that a man of ordinary intelligence and knowledge easily conceives the concepts involved.

Fla.Stat. § 921.141(6)(d), F.S.A., provides that the commission of a capital felony as part of another dangerous and violent felony constitutes not only a capital felony under Fla.Stat. § 782.04(1), F.S.A., but also an aggravated capital felony. Such a determination is, in the opinion of this Court, reasonable.

Capital felonies committed with the motive of avoiding arrest, escape, monetary gain, or the disruption or hinderance of the lawful exercise of government or law enforcement have also been designated as aggravated capital felonies pursuant to Fla.Stat. § 921.141, F.S.A., subsections (e), (f) and (g), F.S.A., and we again feel that the definitions of the crimes intended to be

included are reasonable and easily understood by the average man.

[4-6] The aggravating circumstance which has been most frequently attacked is the provision that commission of an especially heinous, atrocious or cruel capital felony constitutes an aggravated capital felony. Fla.Stat. § 921.141(6)(h), F.S.A. Again, we feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended. It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided in Fla.Stat. § 921.141(7), F.S.A. All evidence of mitigating circumstances may be considered by the judge or jury.

The first mitigating circumstance is that the defendant has no prior significant history of criminal activity. Fla.Stat. § 921.141(7)(a), F.S.A. As to what is significant criminal activity, an average man can easily look at a defendant's record, weigh traffic offenses on the one hand and armed robberies on the other, and determine which represents significant prior criminal activity. Also, the less criminal activity on the defendant's record, the more consideration should be afforded this mitigating circumstance.

Extreme mental or emotional disturbance is a second mitigating consideration, pursuant to Fla.Stat. § 921.141(7)(b), F.S.A., which is easily interpreted as less than insanity but more than the emotions of an average man, however inflamed.

If the victim was a participant in or consented to the criminal conduct, or if the defendant was found guilty of a capital felony as an accomplice and did not play any major part in the capital felony, these factors are also to be considered. Fla.Stat. § 921.141(7), subsections (c) and (d), F.S.A.

While duress or domination by another person may not excuse a capital felony, the Legislature has determined that they should be considered in mitigation, not of the guilt of the defendant, but of the sentence. Fla.Stat. § 921.141(7)(e), F.S.A. Such a consideration appears to us to be reasonable, and another protection of the defendant who has at least some basis for seeking the mercy of society.

Mental disturbance which interferes with but does not obviate the defendant's knowledge of right and wrong may also be considered as a mitigating circumstance. Fla.Stat. § 921.141(7)(f), F.S.A. Like subsection (b), this circumstance is provided to protect that person who, while legally answerable for his actions, may be deserving of some mitigation of sentence because of his mental state.

Finally, the age of the defendant may be considered pursuant to Fla.Stat. § 921.141(7)(g), F.S.A. This allows the judge and jury to consider the effect that the inexperience of the defendant on the one hand or, in conjunction with subsection (a), the length of time that the defendant has obeyed the laws in determining whether or not one explosion of total criminality warrants the extinction of life.

Common law recognizes a presumption of the incapacity of an infant to commit a crime, and under the age of seven years,

the presumption is conclusive. 43 C.J.S. Infants § 96(d)(1)(b); 6 F.L.P., Criminal Law, § 26. The possible effect of great age with its attendant weaknesses and infirmities has also been recognized as to the issue of competency, as the Ohio Court of Common Pleas held,

"[A]ge is an item of proof competent and worthy of being considered in an investigation to determine the question of competency." Corbit v. Corbit, 7 Dec. Repr. 602, p. 607, 1V Wkly.Law Bull. 1006 (Ohio Coshocton C.P.1879).

Thus, the Legislature has chosen to provide for consideration of the age of the defendant—whether youthful, middle aged, or aged—in mitigation of the commission of an aggravated capital crime. The meaning of the Legislature is not vague, and we cannot say that such a consideration is unreasonable *per se*. Any inappropriate application by a jury of the standard under the facts of a particular case may be corrected by the Court.

It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present. Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great. Thus, the discretion charged in *Furman v. Georgia*, *supra*, can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all.

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The Circuit Courts of Duval and Orange Counties have also certified questions involving the interpretation of Fla.Stat. § 782.04, F.S.A., insofar as it defines the crimes of murder in the first degree and murder in the second degree. As quoted above, Fla.Stat. § 782.04(2), F.S.A., provides that murder "committed in the perpetration of or in the attempt to perpetrate" any one of seven specified violent felonies is a murder of the second degree. A murder "committed by a person engaged in the perpetration of or in the attempt to perpetrate" any of the same violent felonies is a murder in the first degree. Fla.Stat. § 782.04(1)(a), F.S.A.

[7] The trial judge in State v. Dixon held that the distinction between the two sections of the murder statute was illusory, and that one charged with one of the crimes could interchangeably be charged with the other at the whim of the grand jury. We disagree, and hold that the statute does establish two separate and easily distinguishable degrees of crime, depending upon the presence of the defendant as a principal in the first or second degree.

Under the prior Fla.Stat. § 782.04, F.S.A. (amended effective December 8, 1972), the distinction was not present, and Fla. Stat. § 776.011, F.S.A., provides,

"Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, is a principal in the first degree and may be charged, convicted and punished as such, whether he is or is not actually or constructively present at the commission of such offense."

The effect of this law was that the traditional definitions of principal in the first degree, principal in the second degree, and accessory before the fact were all combined within the statutory definition of principal in the first degree in Fla.Stat. § 776.011, F.S.A., and in the repealed Fla. Stat. § 782.04, F.S.A.

The obvious intention of the Legislature in making this change is to resurrect the distinction between principals in the first or second degree on the one hand and accessories before the fact on the other, in determining whether a party to a violent felony resulting in murder is chargeable with murder in the first degree or murder in the second degree. As to the distinction in any particular case, we need but refer to the rich heritage of case law on the distinctions between principals in the first or second degree and accessories before the fact.

Having reviewed the statutes under consideration, it is the opinion of this Court that Fla.Stat. §§ 775.082, 782.04 and 921.141, F.S.A., are constitutional as measured by the controlling law of this State and under the constitutional test provided by *Furman v. Georgia*, *supra*.

[8] Accordingly, the certified questions of the Circuit Courts of Dade, Orange and Duval Counties are all answered in the negative, and the decision of the Circuit Court for Dade County in State v. Setser is reversed and the causes are all remanded for further proceedings not inconsistent herewith.

It is so ordered.

CARLTON, C. J., McCAIN and DEKLE, JJ., and WILLIS, Circuit Judge, concur.

ERVIN, J., dissents with opinion.

BOYD, J., dissents with opinion.

ERVIN, Justice (dissenting).

The United States Supreme Court, in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), striking down as unconstitutional the death penalty statutes of Georgia and Texas, held that

"the imposition and carrying out of the death penalty in [these cases] constitute

cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." (Supra at 239-240, 92 S.Ct. at 2727.)

This decision was a 5-4 decision, in which all nine Justices wrote separate opinions. Relying upon *Furman*, the Supreme Court in *Moore v. Illinois*, 408 U.S. 786, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972), unanimously agreed that

"the Court today has ruled that the imposition of the death penalty under statutes such as those of Illinois is violative of the Eighth and Fourteenth Amendments . . . ." (Supra, at 809, 92 S.Ct. at 2570.)

The *Furman* and *Moore* cases were followed by a series of about 120 unanimous per curiam opinions, in which the Supreme Court invalidated the unexecuted death sentences imposed under the state statutes of 26 states,<sup>1</sup> including Florida's death penalty statute.<sup>2</sup>

1. See *Stewart v. Massachusetts*, 404 U.S. 845, 92 S.Ct. 2845, 33 L.Ed.2d 744 (1972), and companion cases.

2. § 775.082(1), F.S.1971. Sentences imposed under Florida's death penalty statute were reversed in *Anderson v. Florida*, 408 U.S. 938, 92 S.Ct. 2868, 33 L.Ed.2d 753 (1972); *Thomas v. Florida*, 408 U.S. 935, 92 S.Ct. 2855, 33 L.Ed.2d 750 (1972); *Johnson v. Florida*, 408 U.S. 939, 92 S.Ct. 2875, 33 L.Ed.2d 762 (1972); *Boykin v. Florida*, 408 U.S. 940, 92 S.Ct. 2876, 33 L.Ed.2d 763 (1972); *Brown v. Florida*, 408 U.S. 938, 92 S.Ct. 2870, 33 L.Ed.2d 750 (1972); *Paramore v. Florida*, 408 U.S. 935, 92 S.Ct. 2857, 33 L.Ed.2d 751 (1972); *Pitta v. Wainwright*, 408 U.S. 941, 92 S.Ct. 2858, 33 L.Ed.2d 765 (1972), and *Williams v. Wainwright*, 408 U.S. 941, 92 S.Ct. 2864, 33 L.Ed.2d 765 (1972).

3. E. g., *Anderson v. State*, 267 So.2d 8 (Fla.1972); *In re Baker*, 267 So.2d 331 (Fla.1972); *Donaldson v. Sack*, 265 So.2d 409 (Fla.1972).

4. All felonies were classified as either capital or first, second, or third degree felonies. § 775.081(1), F.S.1971 F.S.A.

This Court has applied *Furman* and the cases which followed it by vacating all unexecuted death sentences which were imposed under the death penalty statute of Florida as it existed at the time of the *Furman* decision.<sup>3</sup>

Under Section 775.082(1), F.S.1971, F.S.A., the death penalty in existence in Florida at the time of the *Furman* decision, any defendant found guilty of a capital felony<sup>4</sup> was sentenced to death unless there was a recommendation of mercy made by the jury in its verdict of guilty.<sup>5</sup> In those cases where the jury recommended mercy, the defendant was sentenced to life imprisonment. Pursuant to Section 4(2), Article V, Florida Constitution 1968, all cases in which the death penalty was imposed were subject to a direct appeal to this Court as a matter of right. This review, however, was limited to the question of guilt or innocence and not the question of punishment. In those cases where the defendant was not sentenced to

Capital felonies included: premeditated murder, § 782.04(1), F.S.1971 F.S.A.; felony murders, i. e., murders committed in the perpetration of or in the attempt to perpetrate arson, burglary, rape, robbery, abominable and detestable crime against nature, or kidnapping, § 782.041(1), F.S.1971 F.S.A.; bombing or machine-gunning in public places, § 790.19, F.S.1971 F.S.A.; homicide caused by a destructive device, § 790.161(1), F.S.1971 F.S.A.; rape of a female of the age of ten years or more, § 794.01, F.S.1971, F.S.A.; carnal knowledge and abuse of a female child under the age of ten years, § 794.01, F.S.1971, F.S.A., and kidnapping for ransom, § 805.02, F.S.1971, F.S.A.

5. § 775.082(1), F.S.1971, F.S.A., provided: "[a] person who has been convicted of a capital felony shall be punished by death unless the verdict includes a recommendation to [sic] mercy by a majority of the jury. In which case the punishment shall be life imprisonment. A defendant found guilty by the court of a capital felony on a plea of guilty or when a jury is waived shall be sentenced to death or life imprisonment, in the discretion of the court."

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death but to life imprisonment, appellate review was available to the respective District Courts of Appeal.

As a result of the *Furman* line of cases, the Florida Legislature enacted the death penalty statute which is challenged in the cases before us, F.S. Section 921.141, F.S.A. Unlike the old death penalty statute, which gave the jury—or the judge where the defendant pleaded guilty or waived a jury trial—complete and unbridled discretion to decide whether death or life imprisonment would be imposed, the new death penalty statute attempts to limit that discretion in an effort to bring the statute within the requirements of *Furman*. The majority of this Court has held that the Legislature's attempt to re-establish the death penalty has been successful in meeting those requirements. I cannot agree.

Under the new death penalty statute, F.S. Section 921.141, F.S.A. the Legislature has provided for a bifurcated trial system. Under this system a person who is found guilty or pleads guilty to a capital felony<sup>6</sup> receives a second "trial" by the same judge and jury to determine whether the person should be sentenced to death or to life imprisonment. In those cases where the defendant pleads guilty or has waived a jury trial, the statute requires that the trial judge empanel a jury, unless also waived, for the purpose of determining the sentence to impose. Evidence presented at the sentencing hearing is admissible at the discretion of the trial judge.

The jury's function is to make a recommendation at the conclusion of the second hearing as to whether the defendant should be sentenced to death or to life imprisonment. The recommendation, however, is advisory only, in that the trial judge is not in any way bound by their recommendation. The trial judge, based upon his own evaluation of the evidence, makes the actual determination of what sentence to impose.

In those cases where the defendant is sentenced to death, the trial judge is required to set forth in writing his findings upon which the sentence is based. No similar requirement, however, is provided for in those cases where the trial judge imposes life imprisonment. If the death penalty is imposed, the decision is subject to review by this Court upon both the question of guilt or innocence and the question of the sentence. In those cases where life imprisonment is imposed, appellate review exists in the District Courts of Appeal.

Finally, the Legislature has provided a list of eight aggravating circumstances and seven mitigating circumstances which the jury and the trial judge are to consider in their determination of what sentence to impose.

While the total impact of the *Furman* decision is not known because of the nine separate opinions of the United States Supreme Court, one principle seems clear: the discretionary system under which the death penalty has been imposed by the several states is violative of the Eighth and Fourteenth amendments. The questions of whether the death penalty is, per se, unconstitutional and whether all discretionary death penalty statutes are unconstitutional were not sufficiently answered by the U.S. Supreme Court. Nor do I find it necessary to reach those questions at this time. All that is necessary for this Court to decide is the question of whether or not the system provided for in F.S. Section 921.141, F.S.A. sufficiently eliminates the discretion which the U.S. Supreme Court in *Furman* condemned. It is significant to note, however, that several authorities have interpreted *Furman* to hold that no death penalty statute which contains any discretion whatsoever is constitutional. Thus, the Attorney General of Florida in a memorandum dated July 7, 1972, analyzed *Furman* and concluded

"it is my view that the United States Supreme Court's decision has not impaired

6. Capital felonies are now defined by F.S. § 782.01, F.S.A.

and does not prevent the enactment of legislation calling for the death penalty so long as said legislation is mandatory in its terms. Such legislation would present an entirely different legal question than that disposed of by the Court.<sup>7</sup> (Emphasis supplied.)

Also, two Assistant Attorneys General, Mr. Georgieff and Mr. Markey, testifying before the House Select Committee on the Death Penalty on November 27, 1972, stated that any effort to reinstate the death penalty on a discretionary basis would be unconstitutional under *Furman*.<sup>8</sup> The legal advisory staff of the Governor's Committee to Study Capital Punishment, on October 20, 1972, reached a similar conclusion.<sup>9</sup> Finally, the Maryland Court of Appeals, in *Batholomey v. State*, 267 Md. 175, 297 A.2d 696 (1972), states:

"we entertain not the slightest doubt that the imposition of the death sentence under any of the presently existing discretionary statutes of Maryland which authorize, but do not require, that penalty is unconstitutional under *Furman* as violative of the Eighth and Fourteenth Amendments to the federal constitution. In other words, we think the net result of the holding in *Furman* is that the death penalty is unconstitutional when its imposition is not mandatory." (297 A.2d at 701; footnotes omitted.)

7. Memorandum, Attorney General of Florida 7 (July 7, 1972).

8. Hearings, House Select Committee on the Death Penalty, November 27, 1972.

9. Memorandum, Legal Advisory Staff, Governor's Committee to Study Capital Punishment 9 (October 20, 1972).

10. Cal. Penal Code § 190.1 (1970).

11. Conn. Gen. Stat. Rev. § 53a-16 (Supp. 1969).

12. Act of March 27, 1970, No. 1333, Ga. Laws 1970, p. 949.

Without deciding whether any one element of discretion in this statute is violative of the Eighth and Fourteenth amendments, I conclude that the cumulative effect of this statute is to allow essentially the same excessive discretionary system which the U. S. Supreme Court would not allow in the *Furman* line of cases.

Turning to the statute itself, the majority finds the addition of a bifurcated trial system to be one of five steps between conviction and the imposition of the death penalty which provide adequate safeguards to protect a convicted defendant from the imposition of the death penalty where a less harsh punishment might be sufficient. The majority, however, fails to recognize that similar bifurcated trial systems were provided for in statutes held unconstitutional as a result of *Furman*. Bifurcated trials were provided for by the laws of California,<sup>10</sup> Connecticut,<sup>11</sup> Georgia,<sup>12</sup> New York,<sup>13</sup> Pennsylvania,<sup>14</sup> and Texas.<sup>15</sup> Of greater significance is the fact that at the penalty proceeding evidence upon any matter the trial judge deems "relevant" to the sentencing decision and of "probative value" may be admitted.<sup>16</sup> This, of course, constitutes a part of the discretion still remaining in the statute—which the majority recognizes.

The statute also provides for the weighing of evidence, in addition to that admitted into the trial on the question of guilt

13. N.Y. Penal Law, McKinney's Consol. Laws, c. 40, § 125.30 (Supp. 1970-71), § 125.35 (1967).

14. Pa. Stat. Ann., Tit. 18, § 4701 (1963).

15. Tex. Code Crim. Proc., Art. 37.07(2)(b) (Supp. 1970-1971).

16. New York law provided in similar manner that "evidence may be presented by either party on any matter relevant to sentence . . . . Any relevant evidence, not legally privileged, shall be received regardless of its admissibility under the exclusionary rules of evidence." N.Y. Penal Law § 125.35(3) (1967).

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or innocence, by the jury, upon which a recommendation as to what sentence is to be imposed is based; the majority's second step. Following this recommendation, the statute provides that the trial judge make the actual determination of the sentence to be imposed; the majority's third step.

Like the provision for a bifurcated trial system, some of the cases in which the United States Supreme Court reversed the imposition of the death penalty involved states whose laws provided the trial judge with the power to override a jury recommendation of life imprisonment or death.<sup>17</sup>

More importantly, too much discretion still remains in the jury in deciding what recommendation to make and in the trial judge in deciding what sentence to impose. The only attempt to eliminate that discretion is the addition of the lists of aggravating and mitigating circumstances. In making their decisions, both the trial judge and the jury are required to base their decisions upon

"(a) Whether sufficient aggravating circumstances exist . . . and

"(b) Whether sufficient mitigating circumstances exist . . . which outweigh aggravating circumstances found to exist . . ." (Emphasis supplied.)<sup>18</sup>

According to the majority, the existence of the aggravating and mitigating circumstances is the "most important safeguard

presented in Fla.Stat. § 921.141. . . ." The majority, however, fail to recognize that weighing of aggravating and mitigating circumstances, or some similar provision, was required by several of the states, either by statute or case law, whose death penalty statutes were found to be unconstitutional as a result of *Furman*. Some of the circumstances considered were also similar to those provided in the Florida death penalty statute.

For example, Connecticut law provided for a separate hearing upon the question of sentence at which time "evidence may be presented . . . including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition, and any other facts in aggravation or mitigation of the penalty."<sup>19</sup>

Illinois law provided that a defendant "was entitled to have his punishment determined upon evidence limited to the facts and circumstances of that crime,"<sup>20</sup> and it was "the duty of the jury to fix the penalty from a consideration of all the circumstances, including the heinousness, atrocity, and cruelty of the crime. . . ."<sup>21</sup>

In *People v. Grews*, 42 Ill.2d 60, 244 N.E. 2d 593 (1969), the Illinois Court reversed the imposition of the death penalty based upon the fact that the defendant had no prior criminal record, was well regarded by friends, and was acting under the influ-

of mercy could be overridden by the trial judge: *Kelbach v. Utah*, 408 U.S. 955, 92 S.Ct. 2858, 33 L.Ed.2d 751 (1972); *Seemey v. Delaware*, 408 U.S. 939, 92 S.Ct. 2871, 33 L.Ed.2d 760 (1972), and *Steigler v. Delaware*, 408 U.S. 939, 92 S.Ct. 2872, 33 L.Ed.2d 760 (1972).

18. § 921.141(2)(a), (b), F.S.A. Also see § 921.141(3), F.S.A.

19. Conn.Gen.Stat.Rev. § 53a-46(a) (Supp. 1962).

20. *People v. Black*, 367 Ill. 200, 10 N.E. 2d 801, 804 (1937).

21. *People v. Sullivan*, 245 Ill. 87, 177 N.E. 733, 736 (1931).

ence of drugs. In *People v. Walcher*, 42 Ill.2d 139, 246 N.E.2d 256 (1969), the imposition of the death penalty was reversed because the defendant was an alcoholic.

Juries in Nebraska, in making their decisions as to whether defendants should be sentenced to death "had no right to be actuated by considerations of mercy but should be guided alone by the evidence, the facts, and the circumstances disclosed by the record. . . ." In *State v. Hall*, 176 Neb. 295, 125 N.W.2d 918 (1964), a sentence of death was reversed because the defendant was young, feeble-minded and had no previous criminal record.

In Oklahoma, imposition of the death penalty has been reversed because the defendant's participation in felony murder was that of a minor accomplice;<sup>22</sup> because the defendant was intoxicated at the time, had no criminal record, and had a limited education;<sup>23</sup> and on the grounds that the defendant did not have a bad record after return from the army, and the victim was engaged in illegal activity when killed.<sup>24</sup>

In Pennsylvania, the imposition of the death penalty has been reversed where the defendant was young and of low intelligence;<sup>25</sup> where the defendant was devoted to his mother, had a good reputation, and was in a desperate financial situation and was poorly educated;<sup>26</sup> and where the defendant was of good character, without criminal record and there was provocation present.<sup>27</sup>

New Jersey law required that when life imprisonment was recommended the recom-

mendation had to be made "upon and after the consideration of all the evidence."<sup>28</sup> This evidence included evidence relative to the background and the mental and emotional abilities and disabilities of defendants.<sup>29</sup>

Under Ohio law, a decision to recommend mercy had to be based upon "the facts and circumstances described by the evidence."<sup>31</sup>

Finally, under Tennessee law, the penalty for murder was death but it was provided that "the jury may, if they are of opinion that there are mitigating circumstances, fix the punishment at . . ." from twenty years to life imprisonment.<sup>32</sup>

The difficulty with such general provisions was recognized in *McGautha v. California*, 402 U.S. 183, 91 S.Ct. 1454, 28 L. Ed.2d 711 (1971). In *McGautha*, Mr. Justice Harlan, speaking for the majority, states:

"It is apparent that such criteria do not purport to provide more than the most minimal control over the sentencing authority's exercise of discretion. They do not purport to give an exhaustive list of the relevant considerations or the way in which they may be affected by the presence or absence of other circumstances. They do not even undertake to exclude constitutionally impermissible considerations. And, of course, they provide no protection against the jury determined to decide on whimsy or caprice. In short, they do no more than suggest some subjects for the jury to consider during its

22. *Sundahl v. State*, 154 Neb. 550, 49 N.W.2d 680, 704 (1951).

23. *Lewis v. State*, 451 P.2d 309 (Okla.Cr. App.1968).

24. *Williams v. State*, 80 Okla.Cr. 95, 295 P.2d 524 (1949).

25. *Waters v. State*, 87 Okla.Cr. 236, 197 P.2d 299 (1948).

26. *Commonwealth v. Green*, 390 Pa. 137, 151 A.2d 241 (1959).

27. *Commonwealth v. Irelan*, 241 Pa. 43, 17 A.2d 897 (1941).

28. *Commonwealth v. Garramone*, 307 Pa. 507, 161 A. 733 (1932).

29. N.J.Stat.Ann., § 2A:113-4 (1969).

30. *State v. Reynolds*, 41 N.J. 163, 195 A.2d 440 (1963).

31. *State v. Tudor*, 154 Ohio St. 249, 95 N.E.2d 385, 390 (1950).

32. Tenn.Code Ann., § 39-2406 (1955).

deliberations, and they bear witness to the intractable nature of the problem of 'standards' which the history of capital punishment has from the beginning reflected."<sup>33</sup>

Under the Florida death penalty statute the lists of aggravating and mitigating circumstances are provided as the only circumstances which the trial judge and the jury are to consider in making their decisions. The limited nature of the lists provided by the Legislature was, however, also criticized by the U. S. Supreme Court in *McGautha*. On this point, Mr. Justice Harlan states that

"for a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete. The infinite variety of cases and facets to each case would make general standards either meaningless 'boiler-plate' or a statement of the obvious that no jury would need."<sup>34</sup>

Mr. Chief Justice Burger in his dissenting opinion in *Furman* further points out that

"all past efforts 'to identify before the fact' the cases in which the penalty is to be imposed have been 'uniformly unsuccessful' . . . . One problem is that 'the factors which determine whether the sentence of death is the appropriate penalty in particular cases are too complex to be compressed within the limits of a simple formula . . . . Report of the Royal Commission on Capital Punishment, 1949-1953, Cmd. 8932, ¶ 408 [p. 174] (1953). As the Court stated in *McGautha*, '[t]he infinite variety of cases and facets to each case would make general standards either meaningless 'boiler-plate' or a statement of the obvious that no jury would need.' 402 U.

S., at 208, 91 S.Ct., at 1168 [1, 38 L.Ed.2d at 727]. . . . Thus, unless the Court in *McGautha* misjudged the experience of history, there is little reason to believe that sentencing standards in any form will substantially alter the discretionary character of the prevailing system of sentencing in capital cases."<sup>35</sup>

Thus, by limiting the circumstances which the trial judge and the jury must consider, a new problem arises: the impossibility of listing all of the aggravating and mitigating circumstances which should be considered in deciding whether or not to impose the death penalty.

Additionally, the determination of what constitutes sufficient aggravating circumstances or sufficient mitigating circumstances and which set of sufficient circumstances outweighs the other is left to the sole discretion of jury, trial judge, and appellate reviewer. Other than the requirement that the circumstances be sufficient, no guidelines are provided by the statute. Thus both the trial judge and the jury are left with the discretion to determine what weight is to be given to each individual aggravating and mitigating circumstance. The presence or absence of any such circumstance or combination thereof does not compel any particular result. Whether a particular aggravating circumstance or circumstances will outweigh a particular mitigating circumstance or circumstances is solely within the discretion of the trial judge and jury. Additionally, the statute does not provide what burden of proof is required; beyond a reasonable doubt or some other test.

Another problem exists which compounds the excessive discretion which exists in deciding what weight is to be given the aggravating and mitigating circumstances: the exercise of discretion neces-

33. *McGautha v. California*, 402 U.S. 183, 207, 91 S.Ct. 1151, 1167, 28 L.Ed.2d 711, 726 (1971).

34. 14, 408 U.S. at 208, 91 S.Ct. at 1167-1168, 28 L.Ed.2d at 727.

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35. *Furman v. Georgia*, 408 U.S. 238, 401, 92 S.Ct. 2726, 2800-2810, 33 L.Ed.2d 346, 442-443 (1972) (Burger, C. J., dissenting).

sary in interpreting these vague and overbroad circumstances.

Defendants "under sentence of imprisonment"<sup>36</sup> include all persons charged with crimes, whether a violent crime or not, as well as all degrees of crimes which might be considered violent. In determining whether a convicted capital felon has "knowingly created a great risk of death to many persons"<sup>37</sup> discretion is allowed, in fact required, to determine what constitutes "great risk" and what constitutes "many persons." The most difficult aggravating circumstance to justify is where the crime is found to be "especially heinous, atrocious or cruel."<sup>38</sup> Even the majority unintentionally recognize the vagueness of this provision by their statement that "to a layman, no capital crime might appear to be less than heinous."

The mitigating circumstances require the same degree of discretion in interpreting them. What constitutes "no significant history of prior criminal activity"?<sup>39</sup> What interpretation is to be given to "the influence of extreme mental or emotional disturbance"?<sup>40</sup> Also included are tests such as "capacity . . . substantially impaired";<sup>41</sup> the influence of "extreme duress or . . . substantial domination of another";<sup>42</sup> participation as "an accomplice . . . relatively minor,"<sup>43</sup> and the "age of the defendant."<sup>44</sup>

Virtually all of the aggravating and mitigating circumstances thus require in them-

selves the application of judicial discretion in interpreting these circumstances in each individual case. Although the trial judge makes the actual determination of the sentence to impose, he must exercise the same degree of discretion as the jury. The fact that both judge and jury make a determination is of little consequence, for the statute in no way provides what weight, if any, the trial judge must give to the jury's recommendation.

The majority's fourth step—the requirement that the trial judge justify a sentence of death in writing—and the majority's fifth step—appellate review—do not sufficiently eliminate the excessive discretion required by the statute.

Appellate review of the issue of punishment was provided for by several statutes which were found to be unconstitutional as a result of *Furman*.<sup>45</sup> Additionally, the statute does not provide any guides for this Court as to our function upon review. For instance, what weight, if any, is this Court to give to a jury recommendation where the trial judge has not followed that recommendation?

The statute also fails to require either written findings or immediate review by this Court where life imprisonment, rather than the death penalty, is imposed by the trial judge. Thus "no meaningful basis for distinguishing the few cases in which it [the death penalty] is imposed from the many cases in which it is not."<sup>46</sup> is provided for.

36. § 921.141(6) (a), F.S.A.

37. § 921.141(6) (c), F.S.A.

38. § 921.141(6) (b), F.S.A.

39. § 921.141(7) (a), F.S.A.

40. § 921.141(7) (b), F.S.A.

41. § 921.141(7) (f), F.S.A.

42. § 921.141(7) (e), F.S.A.

43. § 921.141(7) (d), F.S.A.

44. § 921.141(7) (g), F.S.A.

45. The United States Supreme Court reversed death sentences in several states in which the state appellate courts had exercised their powers to review a sentence of death. See, e. g., *Alford v. Eymann*, 408 U.S. 939, 92 S.Ct. 2874, 33 L.Ed.2d 762 (1972), which reversed *State v. Alford*, 98 Ariz. 124, 402 P.2d 551 (1965).

46. *Furman v. Georgia*, 408 U.S. 238, 313, 92 S.Ct. 2726, 2764, 33 L.Ed.2d 340, 392 (1972) (White, J., concurring).

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Finally, in addition to the discretion required by F.S. Section 921.141, F.S.A., there exists in our judicial system a degree of discretion at every stage of a criminal proceeding. Mr. Chief Justice Burger recognizes at least one aspect of our judicial system in which the possibility of the exercise of excessive discretion exists when he states,

"there is no assurance that sentencing patterns will change so long as juries are possessed of the power to determine the sentence or to bring in a verdict of guilt on a charge carrying a lesser sentence; juries have not been inhibited in the exercise of these powers in the past."<sup>47</sup>

Although not in itself determinative of this case, this discretion adds to that discretion required in the application of the new death penalty statute. The majority recognizes this fact by its statement that

"discretion and judgment are essential to the judicial process, and are present at all stages of its progression—arrest, arraignment, trial, verdict, and onward through final appeal. Even after the final appeal is laid to rest, complete discretion remains in the executive branch of government to honor or reject a plea for clemency."

Some of the areas where discretion must be exercised include: (1) the inevitable discretion in making factual determinations; (2) the decision of the grand jury; (3) the decision of the prosecutor to bring charges, what charges to bring, and what penalty to ask for; (4) the jury's decision to convict of a lesser included offense; and (5) executive clemency.

In addition to the concern over the existence of excessive discretion, the United

States Supreme Court was bothered by the manner in which the death penalty had been applied. Mr. Justice Stewart stated:

"These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race."<sup>48</sup>

Mr. Justice Marshall states:

"Regarding discrimination, it has been said that '[i]t is usually the poor, the illiterate, the underprivileged, the member of the minority group—the man who, because he is without means, and is defended by a court appointed attorney—who becomes society's sacrificial lamb . . . . Indeed, a look at the bare statistics regarding executions is enough to betray much of the discrimination. . . . It is immediately apparent that Negroes were executed far more often than Whites in proportion to their percentage of the population. . . .

"There is also overwhelming evidence that the death penalty is employed against men and not women. . . .

"It also is evident that the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society."<sup>49</sup>

Mr. Justice Stewart concludes that it has not been proved that the few defendants

47. *Id.*, 408 U.S. at 491, 92 S.Ct. at 2810, 33 L.Ed.2d at 413 (Burger, C. J., dissenting).

48. *Id.*, 408 U.S. at 309-310, 92 S.Ct. at 2762, 33 L.Ed.2d at 369 (1970) (Stewart, J., concurring).

49. *Id.*, 408 U.S. at 364-365, 92 S.Ct. at 2790-2791, 33 L.Ed.2d at 421-422 (Marshall, J., concurring).

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who have been sentenced to die have been selected on the basis of race and thus fails to reach the question of whether the application of the death penalty constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment.

The comments quoted above raise, generally, a second issue which I feel compelled to discuss: Whether the classification selected by the Legislature of Florida of those individuals subject to capital punishment denies to any person within the State of Florida the equal protection of the laws. In discussing this issue, it is necessary to first decide what test is to be applied in determining whether the equal protection's prohibition against unreasonable classifications has been violated.

That laws are all to some degree or another based upon some form of classification is clear. Such classifications are not per se violative of equal protection. But it is also clear that any disparity in treatment of individuals caused by such a classification must be at least *reasonable*.<sup>50</sup> Traditionally, the test of whether a classification is reasonable includes a determination of whether the classification is in itself a rational one, i. e., based upon social, economic, historical or geographic sectors, whether the classification and the legislative purpose are reasonably related, and whether all those included in the classification are treated equally—in light of the above-quoted portions of *Furman* it is doubtful whether the death penalty statutes which were struck down by *Furman* could meet this latter portion of the reasonableness test.

A stricter requirement has been employed where a classification is based upon a "suspect criteria" or where the classification restricts a "fundamental right." In cases involving such classifications, in addition to requiring that the traditional test of reasonableness be met, the states have been required to prove that a "compelling

state interest" is served by the classification.

In my opinion, the selection of capital felons as a class upon whom the death penalty may be imposed clearly involves the "fundamental rights" of citizens of this state and is thus a suspect classification for which a compelling state interest must be shown. Additionally, as Mr. Justice Stewart and Mr. Justice Marshall recognize, the classification may be based, at least in its practical effects, upon race, thus requiring the application of the same test. Because this has not been proved, however, I do not feel it appropriate to hold that the application vel non of Florida's death penalty statute is (or will be) applied on the basis of race. That fundamental rights are involved, however, seems clear and each case where the death penalty has been imposed must be judicially tested to determine if an invidious racial element entered into the imposition.

Mr. Justice Brennan, in concluding that the death penalty is per se unconstitutional, recognizes what can hardly be denied—that the imposition of death deprives a human being of all rights. In discussing the question of whether death is uniquely degrading to human dignity, Mr. Justice Brennan states as follows:

"Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. The contrast with the plight of a person punished by imprisonment is evident. An individual in prison does not lose 'the right to have rights.' A prisoner retains, for example, the constitutional rights to the free exercise of religion, to be free of cruel and unusual punishments, and to treatment as a 'person' for purposes of due process of law and the equal protection of the laws. A prisoner remains a member of the human family. Moreover, he retains the right

50. See *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970).

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of access to the courts. His punishment is not irrevocable. . . . An executed person has indeed 'lost the right to have rights.'"<sup>51</sup>

It is abundantly clear that the imposition of death deprives all persons subjected to such a punishment of all fundamental rights. It also, and possibly of greater significance, deprives those punished by death of life itself.

Turning to the reasoning behind death penalty statutes, Mr. Justice Marshall concludes that there are six purposes conceivably served by capital punishment:

"retribution, deterrence, prevention of repetitive criminal acts, encouragement of guilty pleas and confessions, eugenics, and economy."<sup>52</sup>

While traditionally these purposes have been accepted as justifying the imposition of the death penalty, nevertheless in the light of these sober and thought-provoking reflections of members of the nation's highest court, I can no longer blindly accept their accuracy. As Mr. Justice Brennan points out,

"the outstanding characteristic of our present practice of punishing criminals by death is the infrequency with which we resort to it. The evidence is conclusive that death is not the ordinary punishment for any crime."<sup>53</sup>

Mr. Justice Stewart states,

"it is equally clear that these sentences are 'unusual' in the sense that the penalty of death is infrequently imposed for murder, and that its imposition for rape is extraordinarily rare."<sup>54</sup>

51. *Furman v. Georgia*, 408 U.S. 238, 290, 92 S.Ct. 2724, 2752-2753, 33 L.Ed.2d 346, 378-379 (1972) (Brennan, J., concurring).

52. *Id.* 408 U.S. at 242, 92 S.Ct. at 2770, 33 L.Ed.2d at 408 (Marshall, J., concurring).

53. *Id.* 408 U.S. at 291, 92 S.Ct. at 2753, 33 L.Ed.2d at 379 (Brennan, J., concurring).

Mr. Justice White concludes that

"the death penalty could so seldom be imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system."<sup>55</sup>

Because of the infrequent use of the death penalty, it would seem reasonable, in fact mandatory, that the Florida Legislature reconsider the purposes which have traditionally been assumed to justify so harsh a penalty as death. The Legislature, in re-enacting a death penalty statute, placed its emphasis on merely meeting the requirements of *Furman*. What the Legislature failed to do was to determine whether or not the purposes which have traditionally been assumed to support the imposition of the death penalty remain viable today. Florida's history alone of refusing for the past several years to impose the death penalty should not have been lightly disregarded by the Legislature.

Mr. Justice Marshall has concluded that the traditional purposes of the death penalty do not retain their validity. I am not able at this time to reach the same conclusion, for neither the Legislature in enacting this statute nor the Florida Attorney General in arguing the case, have addressed themselves to this point. It is my conclusion, however, that the State has failed to present sufficient proof upon which it may be concluded that the death penalty is supported by any compelling state interest.

Florida's citizens should not be subjected to a state law imposing the death penalty of greater degree and kind than that which

54. *Id.* 408 U.S. at 309, 92 S.Ct. at 2762, 33 L.Ed.2d at 390 (Stewart, J., concurring).

55. *Id.* 408 U.S. at 311, 92 S.Ct. at 2763, 33 L.Ed.2d at 391 (White, J., concurring).

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may be constitutionally imposed upon other citizens of the nation. Life is such a supremely precious privileged right to have, enjoy and exercise that the Constitution of the United States protects it equally for all the nation's citizens from state governmental deprivations of different kinds and degrees.

Unless Florida's death penalty statute can meet national standards it must fall because of sheer inequality. One state can not have a greater compelling interest in imposing the death penalty than another; nor can its death penalty statute differ in constitutional substance from that of another state.

It is our duty as judges sworn to uphold the nation's constitution to apply national constitutional standards with clinical objectivity in this matter, without catering to popular clamor or the vagaries of provincialism, local pressures, emotion or passion.

Quite candidly and with respect, our Florida Legislature appears from its statutory product to have impulsively and emotionally due to public clamor strayed from the national standards set forth in the plural-opinion decision of the United States Supreme Court in *Furman*. Sober reflection should have its second inning in our State Legislature.

It is my hope that there may be a second inning and, if so, that the Legislature will reconsider this profound subject less precipitately and passionately than it did—less under the influence of archaic and atavistic impulses and the whip of public furor stirred by national and local political opportunism. The grave problem of whether the death penalty should be imposed ought not to be a vehicle for political capital or to serve as an extraneous scapegoat to illogically appease our society's sense of guilt, fear, passion, and vengeance. All of us have feet of clay, none of us has all-knowing impeccable judgment; none of us can be exemplars of "holier than thou" in this matter of governmentally prescribing life or death for other citizens. The

greatest care to follow national standards should be taken by the Legislature in making a collective judgment regarding capital punishment.

In our pecuniary culture the rage to emulate status by invidious comparison on bases of wealth or one's cunning ability to get more and spend more than his neighbors, causes us to constantly downgrade or become callous to the value of humanitarian principles.

The death penalty, to conventional non-thinkers despite conclusions to the contrary of the Supreme Court of the United States, is a protective deterrent essential to class status because capital felonies are often committed by the "have nots" and the economically inferior. They overlook that the hallmark of a civilized progressive people is their appreciation that infliction of cruel and unusual punishment disproportionately upon the underprivileged and the mentally incompetent is the antithesis of a fair and humane society and can be one of the elements leading to anarchy and revolution. Because of pecuniary myopia, we often narrow our horizons of compassion and insularly lack reverence for

Because of our overdrawn servility to the concepts of economic status and our personal standings in those respects, we are inclined to be callous to the virtues of compassion and refuse to take slower paces for the correction of human ills through education and rehabilitation. These more enlightened alternatives are not harsh or speedy enough to suit our atavistic sense of vengeance or our passions, or to calm our imagined fears of threats to our pecuniary society or to abate our belief that extreme deterrents are necessary.

We often avoid the psychological and scientific methods of coping with society's ills—the slower, painstaking rehabilitative measures requisite to the evolution of a peaceful, enlightened society. We seek emotional shortcuts to assuage our fears. Like vigilantes, our humanity and sense of ultimate values are weak. Our Legislature

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should have opportunity again to take these enlightened alternatives more into account in faithfully complying with national standards.

Despite the terror and horribleness of heinous homicidal crime, each instance of which outrages our sensibilities, the need for mature intelligence and understanding in devising therefor the State's corrective and rehabilitative processes is nevertheless mandatory in the light of the pronouncements of the Supreme Court of the United States.

The nation's highest court recognizes we have come a long way from the rack, the "drawing and quartering," the headman's axe, the public executions, the "hanging judge"—from cruel and unusual punishments. We can little afford to turn back because it is clear to thinking people that brutality and cruelty at the hands of government soils the fabric of an enlightened nation. Governments are constantly under scrutiny—constantly gauged by a nation's thinking people in terms of whether they are enlightened and humane; of whether they are still instruments of oppression, perpetrators of archaic punishments to allay the fears and passions of privileged groups.

Sir Winston Churchill wisely said in the House of Commons in 1910:

"The word and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of any country.

"A calm, dispassionate recognition of the rights of the accused, and even of the convicted criminal, against the state; a constant heart-searching by all charged with the duty of punishment; a desire and eagerness to rehabilitate in the world of industry those who have paid

their due in the hard coinage of punishment, tireless efforts toward the discovery of curative and regenerative processes; unfailing faith that there is a treasure if you can only find it, in the heart of every man—these are the symbols which in the treatment of crime and criminal mark and measure the shored up strength of a nation, and are sign and proof of the living virtue within it."

It is therefore my conclusion that Section 921.141, Florida Statutes, F.S.A., is unconstitutional because: (1) the statute does not sufficiently eliminate the discretion in imposing the death penalty which *Furman* condemns; (2) the State has failed to consider or present sufficient proof upon which it may be concluded that the death penalty for a citizen of the United States is justified by a compelling state interest; (3) Florida must comply with national standards as enunciated by the Supreme Court of the United States in imposing a state death penalty; (4) Florida should not apply a death penalty of greater degree and kind to its citizens than do other states—perhaps Florida should await action of the Congress in prescribing the death penalty, if any, according to national standards enunciated by the United States Supreme Court because of the Federal citizenship of the nation's citizens, including Floridians.

BOYD, Justice (dissenting).

I respectfully dissent.

The Supremacy Clause of the Constitution of the United States provides that document is the Supreme Law of the Land.<sup>1</sup> Upon the State courts, equally with the courts of the Federal system, rests the obligation to guard, enforce, and protect every right granted or secured by

be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

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the Constitution of the United States whenever those rights are involved in any suit or proceedings before them." Consequently, it is the duty of State Supreme Courts to follow the guidelines announced by the Supreme Court of the United States in construing Federal Constitutional rights.

From the time Florida became a part of the United States of America, up until 1972, capital punishment had been held to be constitutional by both the courts of the United States and of the State of Florida. However, in *Furman v. Georgia*,<sup>2</sup> and several companion decisions, a majority of the Supreme Court of the United States held capital punishment, as it had been administered in this country, to be unconstitutional. While four members of the Court held the capital punishment laws constitutional, two members clearly indicated that they felt all forms of capital punishment laws violated the Eighth and Fourteenth Amendments to the Constitution of the United States, and the remaining three members of the Court ruled against any capital punishment in which the court or jury had discretion in fixing sentences, as had been the case in most states up to that time.

Although it seems impossible to arrive at any central theme of the Court, nevertheless, by reading the nine separate opinions contained in *Furman*, it seems probable that at least one of those rejecting capital

punishment in that decision might well join the four dissenters and form a majority approving capital punishment if the exercise of discretion by judges and juries should be eliminated, since, in *Furman*, several of the "majority" justices indicated that the only acceptable basis for capital punishment would be a system under which all persons found guilty of certain crimes would be executed without regard to "mitigating" or "aggravating" circumstances.

Assuming, *arguendo*, that the Supreme Court of the United States might approve a capital punishment statute under which no discretion would be exercised, let us now weigh Florida's new capital punishment statute against that concept to see whether said statute meets Federal Constitutional standards.

Under the prior law,<sup>3</sup> when a trial jury found a person guilty of a capital felony, a majority of the twelve member jury could mandate a life sentence for the defendant, instead of death, by recommending him to the mercy of the court. The judge would then be compelled by statute to impose a life sentence. Alternatively, if no such recommendation was given, the judge was similarly compelled to impose a death sentence. It was this type of discretion exercised by juries under the prior law which was so strongly condemned by the Court in *Furman*.

recommendation to mercy by [a majority of] the jury. When the verdict includes a recommendation to mercy by [a majority of] the jury, the court shall sentence the defendant to life imprisonment. A defendant found guilty by the court of an offense punishable by death [on a plea of guilty or] when a jury is waived shall be sentenced by the court to death or life imprisonment." (Emphasis supplied.)

Of course, according to its normal usage, the word "shall" in a statute has a mandatory connotation. See *City of Orlando v. County of Orange*, 276 So.2d 41, 43, n. 4 (Fla.1973), citing *Neal v. Bryant*, 149 So.2d 329 (Fla.1962).

2. *Irvin v. Dowd*, 350 U.S. 394, 79 S.Ct. 325, 3 L.Ed.2d 900 (1956); *Smith v. O'Grady*, 312 U.S. 329, 61 S.Ct. 572, 85 L.Ed. 850 (1941); *United States v. Bank of New York and Trust Company*, 296 U.S. 463, 56 S.Ct. 343, 80 L.Ed. 331 (1936); *Moore v. Holohan*, 244 U.S. 103, 35 S.Ct. 340, 79 L.Ed. 791 (1955).

3. 403 U.S. 238, 92 S.Ct. 2724, 31 L.Ed.2d 346 (1972).

4. Section 921.141, Florida Statutes, 1971, F.S.A., which provided: "A defendant found guilty by a jury of an offense punishable by death shall be sentenced to death unless the verdict includes a

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The new law provides, generally, for a jury first to determine guilt or innocence, and then for that same jury to consider circumstances, relating both to the defend-

5. Section 921.141, Florida Statutes, as amended by Chapter 72-724, Laws of Florida, which provides:

"(1) Upon conviction or adjudication of guilt of a defendant of a capital felony the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by section 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury empaneled for that purpose unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7) of this section. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements; and further provided that this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

"(2) After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court based upon the following matters:

"(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6), and

"(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh aggravating circumstances found to exist, and

"(c) Based on these considerations whether the defendant should be sentenced to life or death.

"(3) Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings

upon which the sentence of death is based as to the facts:

"(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

"(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and based upon the records of the trial and the sentencing proceedings.

"(4) If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with section 775.082.

"(5) The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Supreme Court.

"(6) Aggravating circumstances.—Aggravating circumstances shall be limited to the following:

"(a) The capital felony was committed by a person under sentence of imprisonment;

"(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person;

"(c) The defendant knowingly created a great risk of death to many persons;

"(d) The capital felony was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit any robbery, rape, arson, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb;

"(e) The capital felony was committed for the purpose of avoiding or pre-

ant and the crime, upon which to make a recommendation for the imposition of death or a life sentence. Regardless of the jury's recommendation, however, the judge may, in his discretion, impose a sentence of death or life. In point of fact, a death sentence could be imposed although the entire twelve member jury had recommended a life sentence. Likewise, the judge could impose a life sentence although the entire jury had recommended death.

Under the old system, a majority of the twelve member jury, in the exercise of their discretion, determined the nature of the punishment. Under the new law, to the exercise of that discretion is added the opportunity for the arbitrary, completely unfettered, and final exercise of discretion

venting a lawful arrest or effecting an escape from custody;

"(f) The capital felony was committed for pecuniary gain;

"(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

"(h) The capital felony was especially heinous, atrocious or cruel.

"(7) Mitigating circumstances.—Mitigating circumstances shall be the following:

"(a) The defendant has no significant history of prior criminal activity;

"(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

"(c) The victim was a participant in the defendant's conduct or consented to the act;

"(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

"(e) The defendant acted under extreme duress or under the substantial domination of another person;

"(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

"(g) The age of the defendant at the time of the crime." (Emphasis supplied).

6. Compare Section 782.01(1)(a), Florida Statutes, as amended by Chapter 72-724, Laws of Florida:

Clearly, the new law provides for even more discretion than the old law, which was condemned in *Furman*.

With the same objectivity as a merchant measuring cloth, I have compared the new Florida capital punishment statute with Federal constitutional standards, and find it to be unconstitutional.

Additionally, the statute is inherently defective in that the distinctions between first and second degree murder are so ambiguous as to make it impossible for grand juries, petit juries, and judges to distinguish the difference.<sup>6</sup> As written, the effect of these statutory provisions is that one who illegally causes the death of another while committing certain other felo-

*The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb, or which resulted from the unlawful destruction of a human being by a person over the age of seventeen (17) years when such destruction is to be the proximate cause of the death of the user shall be murder in the first degree and shall constitute a capital felony, punishable as provided in section 775.082." (Emphasis supplied.)* With Section 782.01(2), Florida Statutes, as amended by Chapter 72-724, Laws of Florida:

When perpetrated by any act imminently dangerous to another, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual or when committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb, it shall constitute a felony of the second degree, punishable by imprisonment for life, or for not more than thirty years as may be determined by the court." (Emphasis supplied.)

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nies may be guilty of first degree murder, while, in another trial, one who causes death to another under exactly the same circumstances may be guilty of second degree murder.

I am aware of the strong political, social, economic, religious, and philosophical views on capital punishment held by the public. These are proper matters for the Legislature to consider in the enactment of criminal statutes. When laws are constitutional, the courts should interpret them and should not legislate. My personal views on capital punishment must be subordinate to my sworn duty to follow and interpret the written law. As a Justice of this Court, I have, in the past, carefully followed prior Federal Constitutional guidelines by affirming approximately thirty death sentences, and upholding Florida's old capital punishment statute. I now must determine that Florida's current capital punishment statute is inadequate to meet the requirements of the Supreme Court of the United States, and I, therefore, must dissent.



Eddie T. JACKSON, Petitioner,

v.

NAT HARRISON ASSOCIATES and the  
Florida Industrial Relations Commission,  
an Administrative Agency, Respondents.

No. 43101.

Supreme Court of Florida.

June 6, 1973.

Certiorari to review an order of the Industrial Relations Commission reversing a compensation order of the Judge of Industrial Claims in favor of petitioner. The Supreme Court, Carlton, C. J., held that to determine whether an employee has suf-

fered a successive compensable injury, Judge of Industrial Claims must first find that employee has received compensation for a previous permanent partial disability, impairment or disease, that employee incurred another compensable permanent partial disability from injury or disease, and that second disability merged with preexisting one to cause a greater permanent partial disability than would have resulted from second injury or disease alone, and to determine amount of compensation to allow for a subsequent injury, judge must make a finding as to entire resulting disability and compensation payable therefor, determined on basis of employee's earning capacity at time of second injury, and, after deducting actual compensation received for preexisting disability, whether by settlement or otherwise, award the difference of any.

Returned to Commission with instructions to remand to judge for necessary findings.

#### 1. Workmen's Compensation $\Rightarrow$ 1755

To determine whether an employee has suffered successive compensable injuries which have cumulative effects, Judge of Industrial Claims must find that employee has received compensation for a previous permanent partial disability, impairment or disease, that employee incurred another compensable permanent partial disability from injury or disease, and that second disability merged with preexisting one to cause a greater permanent partial disability than would have resulted from second injury or disease alone. F.S.A. § 440.15(5) (c).

#### 2. Workmen's Compensation $\Rightarrow$ 845, 1755

To determine amount of compensation to allow for a subsequent injury, Judge of Industrial Claims must make a finding as to entire resulting disability and compensation payable therefor, determined on basis of employee's earning capacity at time of

SAWYER, Anthony Eugene, Appellant,

v.

STATE of Florida, Appellee.

No. 44709.

Supreme Court of Florida.

Feb. 19, 1975.

The Dade County Circuit Court, Paul Baker, J., found defendant guilty of felony-murder in the first degree, sentenced him to death, and he appealed. The Supreme Court, Overton, J., held that imposition of the death penalty on defendant was justified by the aggravating circumstances disclosed of record, including (1) the facts of the armed robbery incident, (2) defendant's prior record, including the commission of multiple robberies, (3) the fact that he was a hard drug user, requiring the expenditure of \$200 per day, and (4) the specific finding of threats of reprisals by defendant, a man with an uncontrollably violent temper, against those persons involved in the trial and prosecution of him.

Judgment and sentence affirmed.

Ervin (Retired), J., dissented in part and concurred in part with an opinion in which Boyd, J., concurred.

Dekle, J., dissented.

#### Homicide $\Rightarrow$ 354

Imposition of death penalty on defendant, who was convicted of felony-murder in the first degree, was justified by the aggravating circumstances disclosed of record, including (1) the facts of the armed robbery incident, (2) defendant's prior record, including the commission of multiple robberies, (3) the fact that he was a hard drug user, requiring the expenditure of \$200 per day, and (4) the specific finding of threats of reprisals by defendant, a man with an uncontrollably violent temper, against those persons involved in the trial

and prosecution of him. West's F.S.A. §§ 782.04, 921.141(2).

Robert S. Guralnick of Guralnick & Gellman, Miami, for appellant.

Robert L. Shevin, Atty. Gen., and Raymond L. Marky, Asst. Atty. Gen., for appellee.

OVERTON, Justice.

This cause is before us on a direct appeal by the appellant from a conviction of a felony murder in the first degree and a sentence of death imposed on him by the Circuit Court for Dade County, Florida. We have jurisdiction pursuant to Article V, Section 3(b)(1), Florida Constitution.

The facts are as follows: On January 12, 1973, the appellant and two other individuals entered a liquor store in Dade County, Florida, for the purpose of perpetrating a robbery. The appellant, with a revolver in his hand, directed the proprietor's son to turn over all of the money. The son turned over the money in the cash register, and then the appellant pushed the son into the back room, questioning him with regard to "the rest of it." At this point, the son, his father, and appellant were in the back room together. The wife of the proprietor picked up a bottle of whiskey and, while standing behind the appellant, struck him over the head with it. Simultaneously, the owner grabbed the appellant around the chest in an attempt to subdue him. During the struggle, the gun which the appellant was holding discharged twice, striking the son and causing his death. The owner released appellant, reaching for his son, and the appellant fled the store. Other shots were fired, resulting in the proprietor's wife being slightly wounded.

The appellant was indicted for first degree murder, and after trial the jury returned a verdict of guilty of murder in the



first degree as charged in the indictment. At the hearing on the advisory sentence, the only additional evidence presented to the jury was the appellant's prior record. The appellant put on no evidence in his own behalf other than the closing statement of his counsel. After hearing and deliberation, the jury returned an advisory sentence for life imprisonment by a majority vote. The trial court overruled the trial jury in its recommendation and imposed the sentence of death, setting forth its reasons and findings in a written order which is as follows:

"THIS CAUSE came before the Court for trial by jury and after deliberation a verdict was rendered finding the defendant guilty of Murder in the First Degree.

"Thereafter, the defendant was adjudicated guilty by the Court and the jury after hearing additional matters retired to consider an advisory sentence pursuant to Florida Statute 921.141(2). The jury returned and in open court recommended a sentence in the State Penitentiary for life.

"This Court is in possession of additional facts which the jury did not have during their deliberation on the advisory sentence. Those facts are as follows:

"1. The defendant is charged in the United States District Court for the Southern District of Florida with the crime of bank robbery.

"2. This Court takes judicial notice of its own calendar and notes that there are thirteen (13) additional robbery cases against the same defendant, and that except for four (4) all have been heard before a magistrate and the magistrate has found that the proof was evident and the presumption great that the defendant, ANTHONY E. SAWYER, committed the offenses with which he stands charged. In the remaining four (4) robbery cases the defendant, AN-

THONY E. SAWYER, waived his right for a preliminary hearing.

"3. During the course of the trial the defendant communicated to various bailiffs that he would take reprisals against persons conducting the trial in the event he would be found guilty.

"4. On October 15, 1973, the date the defendant was to appear before the jury for the rendition of an advisory sentence, he refused to leave his cell in the Dade County Jail, physically assaulted one of the Corrections and Rehabilitation officers and had to be forcibly brought before the Court in handcuffs and leg irons. Counsel for the defendant objected to his being viewed by the jury with handcuffs and leg irons and additional guards were ordered in the courtroom and the handcuffs and leg irons were removed prior to a view by the jury.

"5. The Court finds the defendant is possessed of a violent and ungovernable temper, that he has demonstrated violence in the past and that he has the ability to carry out threats of violence expressed during the course of the trial.

"6. The defendant according to the testimony adduced during the trial was supporting a drug habit of \$200.00 a day or \$72,000.00 a year. The Court is of the opinion that there is insufficient assistance available to curb this drug habit and the defendant could not be rehabilitated to a point where he would no longer be a danger to the community.

"For the reasons hereinabove stated, this Court, having considered the advisory opinion of the jury as well as the additional circumstances not known to the jury, has made the determination that the defendant be sentenced to death by electrocution."

Items 1 through 4 in the aforementioned order contain factual matters that were not presented to the jury. The appellant takes

no issue with the facts as set forth therein. We have granted a motion by the State to complete the record and include the appellant's plea of guilty to ten separate charges of robbery. This substantially corroborates the finding by the trial judge in Item 2 of the aforementioned order.

We find that the aggravating circumstances including (1) the facts of the armed robbery incident; (2) the prior record, including the commission of multiple robberies; (3) the fact that the appellant was a hard drug user, requiring the expenditure of \$200.00 per day; and (4) the specific finding of threats of reprisals against persons involved in the trial and prosecution of the appellant and the appellant's violent temper, taken together, are more than adequate to justify the imposition of the death penalty in this cause.

The contentions raised by the appellant alleging the vagueness of the felony murder provisions of Section 782.04, Florida Statutes, are without merit and have been answered by this Court in *State v. Dixon*, 283 So.2d 1 (Fla.1973). See also *State v. Carroll*, 287 So.2d 304 (Fla.1973).

The contention that the imposition of the death penalty is unconstitutional has also been previously answered by this Court, and we adhere to those rulings. *State v. Dixon*, supra; *State v. Carroll*, supra.

Accordingly, no reversible error appearing, the judgment and sentence of the circuit court appealed from are hereby affirmed.

It is so ordered.

ADKINS, C. J., and ROBERTS and McCAIN, JJ., concur.

ERVIN (Retired), J., dissents in part and concurs in part with opinion, with which BOYD, J., concurs.

DEKLE, J., dissents.

ERVIN, (Retired), Justice (concurring in part and dissenting in part):

I concur in the opinion of the majority to the extent that it affirms appellant's

conviction of first degree murder and dissent to the extent that it affirms his sentence of death. I would commute appellant's sentence to life imprisonment on two grounds.

First, I cannot agree with the prior and present judgment of this Court as to the constitutionality of the Florida death penalty statutes, Sections 921.141, 782.04 and 775.082, F.S., in the light of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). See my dissenting opinions in *State v. Dixon*, 283 So.2d 1 (Fla. 1973); *Spinkellink v. State*, 313 So.2d 666, now pending, and *Gardner v. State*, 313 So.2d 675, now pending.

Second, it appears to me that the trial judge, in overruling the jury's recommendation of life imprisonment and in sentencing appellant to death, took into consideration and relied upon aggravating circumstances not expressly provided by Section 921.141(6), including robbery charges pending against appellant of which he has not yet been convicted, appellant's demeanor and conduct at the trial for which he has not yet been charged or convicted, and appellant's allegedly incurable drug addiction.

Although Section 921.141(1) permits at the sentencing hearing the introduction of any evidence as to any matter that the trial judge deems relevant to sentencing regardless of its admissibility under the exclusionary rules of evidence, as I read the statute, Section 921.141(3) limits the trial judge as to the sentence to be imposed to the aggravating circumstances expressly enumerated in Section 921.141(6) and the mitigating circumstances expressly enumerated in Section 921.141(7). Furthermore, this Court said in *Dixon*:

"The most important safeguard presented in Fla.Stat. § 921.141, F.S.A., is the propounding of aggravating and mitigating circumstances which must be determinative of the sentence imposed." (Emphasis supplied). 283 So.2d at 8.

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Here the trial judge did not adhere in sentencing to the express guidelines of the statute and, as a result, reintroduced the element of discretion rejected in *Furman*.

For these reasons, I would reduce appellant's sentence to life imprisonment in accord with the recommendation of a majority of the jury.

ROYD, J., concurs.



NORTH PORT BANK, etc., Appellant,

v.

STATE of Florida, DEPARTMENT OF REVENUE, et al., Appellees.

No. 45613.

Supreme Court of Florida.

April 16, 1975.

Rehearing Denied June 30, 1975.

Taxpayer appealed a decision of the Circuit Court, Leon County, Donald O. Hartwell, J., upholding the constitutionality of statute setting forth requirements prior to institution of suit challenging assessment of intangible personal property taxes. The Supreme Court, Boyd, J., held that statute providing that a taxpayer shall, except where taxes have been paid, tender into court and file with complaint full amount of complained of assessment including penalties or file with complaint bond to satisfy any judgment or decree in full, including taxes complained of and penalties if construed not to require taxpayer to post bond in amount of contested assessment but only to require taxpayer to post bond upon satisfaction of court's judgment as to proper tax, is constitutional.

Affirmed.

# 1. Courts ⇨216

Supreme Court had jurisdiction over appeal from judgment passing upon constitutionality of statute requiring taxpayer to tender into court and to file with its complaint full amount of complained of assessment of intangible personal property taxes, including penalties, or, alternatively, to file cash or surety bond with complaint. West's F.S.A. § 199.242(3); West's F.S.A.Const. art. 5, § 3(b)(3).

# 2. Taxation ⇨572

Transitory nature of intangible personal property taxes justifies the State in adopting collection methods that differ from those used to collect real property ad valorem taxes.

# 3. Constitutional Law ⇨328

## Taxation ⇨37.6

Statute providing that a taxpayer shall, except where taxes have been paid, tender into court and file with complaint full amount of complained of assessment of intangible personal property taxes including penalties or file with complaint bond to satisfy judgment in full, including taxes complained of and penalties, if construed not to require the posting of a bond in amount of contested assessment but to require the posting of bond upon satisfaction of court's judgment as to proper tax, does not deny taxpayer constitutional right of access to courts. West's F.S.A. § 199.242(3); West's F.S.A.Const. art. 1, § 21.

# 4. Constitutional Law ⇨48(1)

It is established maxim of statutory construction that courts have judicial obligation to sustain legislative enactments when possible.

# 5. Taxation ⇨451

Whenever taxpayer believes intangible personal property taxes assessed are too high, administrative remedies should first be exhausted.

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Learie Leo ALFORD, Appellant,

v.

STATE of Florida, Appellee.

No. 44647.

Supreme Court of Florida.

Jan. 29, 1975.

Rehearing Denied Feb. 19, 1975.

Defendant was convicted in the Circuit Court, Palm Beach County, Marvin U. Mounts, Jr., J., of rape and murder. Defendant appealed. The Supreme Court, Adkins, C. J., held that the murder statute was constitutional and that certain rulings on admission of evidence had not been erroneous. Where the trial judge found that the premeditated murder was committed while defendant was engaged in the commission of or in flight after committing rape and that the act was especially heinous, atrocious and cruel and that the only mitigating circumstance was that defendant had no significant prior criminal record, and where evidence of guilt was particularly strong, and in view of the Supreme Court's comparison of the aggravating and mitigating circumstances with those shown in other capital cases, death was the proper sentence.

Affirmed.

Ervin, Retired, J., dissented.

# 1. Criminal Law ⇨1206(1)

Capital punishment is not per se violative of Constitution of United States or of State. West's F.S.A. §§ 782.04, 921.141; U.S.C.A.Const. Amends. 8, 14.

# 2. Criminal Law ⇨1206(1)

Procedure outlined in capital punishment statute is such that discretion is controlled and channeled until sentencing process becomes matter of reasonable judgment rather than exercise in discretion, and penalty provisions of statute are not unconstitutional. West's F.S.A. § 921.141; U.S.C.A.Const. Amends. 8, 14.

ment rather than exercise in discretion, and penalty provisions of statute are not unconstitutional. West's F.S.A. § 921.141; U.S.C.A.Const. Amends. 8, 14.

# 3. Courts ⇨91(1)

Authoritative construction of state statute by highest court of State is binding as to what statute does or does not mean. West's F.S.A. §§ 782.04, 921.141.

# 4. Homicide ⇨8

Statutes were not unconstitutional as failing to adequately distinguish between felony-murder in first degree and felony-murder in second degree. West's F.S.A. §§ 782.04, 921.141.

# 5. Criminal Law ⇨371(4, 9, 12)

In prosecution for rape and murder, testimony concerning defendant's unsuccessful attempt to commit homosexual act shortly before commission of act charged was admissible to establish state of mind and motive. West's F.S.A. §§ 782.04, 921.141.

# 6. Searches and Seizures ⇨7(1)

Seizure of so-called "mere evidence" of crime is not proscribed by Fourth Amendment. U.S.C.A.Const. Amend. 4.

# 7. Searches and Seizures ⇨3.8(2)

Where officers had search warrant and consent from defendant to search his apartment, officers were warranted in seizing items found in plain view or discovered inadvertently during course of reasonable search of premises, in absence of indication that they were conducting general exploratory search or that search for spent cartridges was subterfuge or excuse to conduct general exploratory search. U.S.C.A.Const. Amend. 4; West's F.S.A. §§ 933.18, 933.18(6).

# 8. Searches and Seizures ⇨3.6(2)

Shell casings constituted "instrumentality or means" of shooting within statute

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concerning scope of search warrant. West's F.S.A. §§ 933.18, 933.18(6); U.S. C.A.Const. Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

#### 9. Criminal Law ◊539(1)

Where all procedural and evidentiary requirements prerequisite to introduction of "former testimony" were met, there was no error in allowing testimony given at preliminary hearing to be read to jury at trial.

#### 10. Criminal Law ◊438(1)

When photograph is relevant it is admissible, unless what it depicts is so shocking in nature as to overcome value of its relevancy.

#### 11. Criminal Law ◊438(6, 7)

In prosecution for rape and murder, where defense counsel stated that he did not know whether victim was raped or whether "necessary force and violence" had been used, photographs showing that deceased had been blindfolded and had sustained numerous bullet wounds were relevant to prove "force and violence," and where photographs were not so gruesome or inflammatory as to create undue prejudice in minds of jury, they were admissible.

#### 12. Criminal Law ◊1206(3)

"Aggravating circumstances" of capital punishment statute actually define those crimes to which death penalty is applicable in absence of mitigating circumstances. West's F.S.A. § 921.141.

See publication Words and Phrases for other judicial constructions and definitions.

#### 13. Criminal Law ◊571

"Aggravating circumstances" of capital punishment statute must be proved beyond reasonable doubt before being considered by judge or jury. West's F.S.A. § 921.141.

#### 14. Criminal Law ◊1206(3)

Term "heinous" as used in statute defining aggravating circumstances authorizing death penalty means extremely wicked or shockingly evil. West's F.S.A. § 921.141.

See publication Words and Phrases for other judicial constructions and definitions.

#### 15. Criminal Law ◊1206(3)

Term "atrocious" as used in statute setting forth aggravating circumstances authorizing death penalty means outrageously wicked and vile. West's F.S.A. § 921.141.

See publication Words and Phrases for other judicial constructions and definitions.

#### 16. Criminal Law ◊1206(3)

Term "cruel" as used in statute relating to aggravating circumstances authorizing death penalty means designed to inflict high degree of pain with utter indifference to, or even enjoyment of, suffering of others. West's F.S.A. § 921.141.

See publication Words and Phrases for other judicial constructions and definitions.

#### 17. Criminal Law ◊1206(3)

When one or more of statutory "aggravating circumstances" is found, death is presumed to be proper sentence under capital punishment statute unless such circumstance or circumstances are overridden by one or more of mitigating circumstances provided by statute. West's F.S.A. § 921.141.

#### 18. Criminal Law ◊986

In capital case, all evidence of statutory "mitigating circumstances" may be considered by judge or jury. West's F.S.A. § 921.141.

#### 19. Homicide ◊354

Where trial judge found that premeditated murder of victim was committed

#### ALFORD v. STATE

Cite as, Fla., 307 So.2d 433

while defendant was engaged in commission of or in flight after committing life felony of rape and that act was especially heinous, atrocious and cruel and that only mitigating circumstance was that defendant had no significant prior criminal record and where evidence of guilt was particularly strong, and in view of Supreme Court's comparison of aggravating and mitigating circumstances with those shown in other capital cases, death was proper sentence. West's F.S.A. § 921.141.

David Roth, of Cone, Wagner, Nugent, Johnson & McKeown, and Joel T. Daves III, of Burdick & Daves, West Palm Beach, for appellant.

Robert L. Shevin, Atty. Gen., and Raymond L. Marky, Asst. Atty. Gen., for appellee.

#### ADKINS, Chief Justice.

Again we consider the constitutionality of the Florida murder statute, Fla.Stat. § 782.04 and § 921.141, F.S.A., which we upheld in State v. Dixon, 283 So.2d 1 (Fla. 1973). Jurisdiction to hear this cause lies in Fla.Const., art. V, § 3(b)(1), F.S.A.

Appellant, Learie Leo Alford (hereinafter referred to as defendant), a 27-year-old male, was convicted of the rape and murder of a 13-year-old female.

On Sunday, January 7, 1973, the deceased left her home to meet her girl friend at a neighborhood bus stop so the two could go to the beach together. Later that day, her body was discovered lying atop a trash pile in an area west of Riviera Beach. She had been raped and shot to death, execution style; her nude body was found blindfolded, with bullet wounds in her head, chest, back and arm.

Several witnesses described a man wearing a white hat and fitting Alford's description and a car similar to the one driven by him present at or near the scene of

the crime at about 10:30 a. m., the approximate time of death.

Ballistic experts stated that at least one of the projectiles found in the victim's body came from the pistol of defendant's supervisor, Willie White. White, a security guard, testified that on the morning of January 7th, he had given the pistol to Alford when the latter relieved him of duty at the freight yard where he worked.

Pursuant to a search warrant which authorized a search of defendant's dwelling for spent .38 caliber cartridge casings, various items of clothing, including a floppy white hat, were seized. The clothing indicated the presence of blood factors A and O. Also, cotton swabs taken from the vaginal and anal area of victim's body indicated the presence of blood factors A and O. The victim's blood type was A; defendant's blood type is O.

The only defense raised by appellant at the trial was alibi. He denied involvement in the crime.

After finding the defendant guilty of murder in the first degree, the jury in a separate sentencing proceeding pursuant to Fla.Stat. § 921.141, F.S.A., recommended the death penalty. The trial judge then made his written findings of fact required by Fla.Stat. § 921.141(3)(b), F.S.A. Although the defendant had no significant history of prior criminal activity, the trial judge gave as a reason for imposing the death sentence the following aggravating circumstances: The capital felony of murder in the first degree was committed while the defendant was engaged in the commission of, or in flight after committing a life felony, which was rape, and of which he was convicted in the same trial; this capital felony was especially heinous, atrocious and cruel.

[1, 2] This appeal is from the judgment of guilt and sentence to death.

Defendant first contends that Fla.Stat. § 782.04, F.S.A., taken in conjunction with

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the penalty provisions found in Fla.Stat. § 921.141, F.S.A., is unconstitutional and violates the dictates of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Defendant recognizes that this Court upheld the statute in *State v. Dixon*, *supra*, but says that we should recede from this decision because discretionary death penalties are unconstitutional or, in the alternative, the imposition of the death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

We reaffirm the decision in *State v. Dixon*, *supra*, holding that the mere presence of discretion in the sentencing procedure does not violate *Furman v. Georgia*, *supra*. This Court, in *State v. Dixon*, said:

"Discretion and judgment are essential to the judicial process, and are present at all stages of its progression—arrest, arraignment, trial, verdict, and onward through final appeal. Even after the final appeal is laid to rest, complete discretion remains in the executive branch of government to honor or reject a plea for clemency. See Fla.Const., art. IV, § 8, F.S.A., and U.S.Const., art. II, § 2.

"Thus, if the judicial discretion possible and necessary under Fla.Stat. § 921.141, F.S.A., can be shown to be reasonable and controlled, rather than capricious and discriminatory, the test of *Furman v. Georgia*, *supra*, has been met. What new test the Supreme Court of the United States might develop at a later date, it is not for this Court to suggest." 283 So.2d 1, pp. 6 and 7.

The procedure outlined in Fla.Stat. § 921.141, F.S.A., is such that the discretion is controlled and channeled until the sentencing process becomes a matter of reasonable judgment rather than an exercise in discretion at all.

Furthermore, capital punishment is not, per se, violative of the constitution of the

United States or of Florida. See *Wilson v. State*, 225 So.2d 321 (Fla.1969).

[3,4] Defendant next contends that the Legislature failed to adequately distinguish between felony murder in the first degree and felony murder in the second degree, in that these provisions are so ambiguous that the same act may constitute either first degree or second degree murder, depending upon the whim of the prosecutor. This question was also laid to rest in *State v. Dixon*, *supra*, which we reaffirm on this point also. For the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation, the United States Supreme Court will take the statute as though it read precisely as the highest Court of the State has interpreted it. An authoritative construction of a state statute by the Supreme Court of Florida is binding as to what the statute does or does not mean. See *Wainwright v. Stone and Huffman*, 414 U.S. 21, 94 S.Ct. 190, 38 L.Ed.2d 179 (1973); *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).

The first and second contentions of defendant, attacking the constitutionality of the capital punishment statute as well as the procedure thereunder, are without merit.

[5] Defendant next contends the trial judge committed prejudicial error by admitting evidence that the defendant and another man attempted to engage in an homosexual act immediately prior to the commission of the offense charged.

It is settled law in this State that evidence of any facts relevant to a material fact in issue, except where the sole relevancy is character or propensity of the accused is admissible unless precluded by some specific exception or rule of exclusion. *Williams v. State*, 110 So.2d 654 (Fla.1959).

The trial judge in the case *sub judice* admitted testimony that defendant and an-

other man attempted to engage in anal intercourse in the hour preceding the rape and murder of the victim. Defendant says such evidence was irrelevant and constituted an improper assault on the character of the defendant, prejudicing him in the minds of the jury.

The State says that defendant's unfulfilled desire to have sexual relations with another man led to the abduction of the victim and the sexual assault upon her. The other man testified that he and the defendant were unsuccessful in engaging in anal intercourse due to the presence of other people in the area. Thus the State maintains that sexual frustration resulting from the inability to complete the homosexual act occurring around 9:30 a. m., was the motive for the sexual assault on the victim occurring between 10:00 a. m. and 11:00 a. m. the same day. Accordingly, the State maintains the testimony was relevant and admissible.

In *State v. Statewright*, 300 So.2d 674, (Fla.1974), the State attempted to show that the motive for the murder was the accused's fear that the deceased would publicly reveal the accused's alleged homosexuality, the accused supposingly having made improper advances to the deceased. We held that testimony relating to a homosexual act allegedly committed by the accused some five years prior to the crime for which he was tried was relevant to the issue of motive.

*Commonwealth v. Winter*, 289 Pa. 284, 137 A. 261 (1927), is a well-reasoned decision with facts similar to those in the instant case. The facts disclosed a sadistic murder of two children, a brother and sister, one seven years old and the other nine. Evidence was admitted that within an hour of the time when he met them, the accused tried unsuccessfully to solicit the victims' older brothers to commit sodomy. The Court stated:

"The courts are bound to recognize, particularly in crimes relating to matters of sex . . . that the mental state of

the accused is an important factor; anything which throws light upon his state of mind just previous to the commission of the offense with which he is charged strongly illuminates his place in the picture of the crime and gives better opportunity to estimate the likelihood of his connection with it. . . .

"Our conclusion is that the evidence of defendant's solicitation of the two other children to commit an unnatural crime was properly received as showing his state of mind on the day in question shortly before the commission of the crime with which he was charged, and the motive which governed him in seeking to have the two deceased children accompany him, and in their subsequent murders." 137 A. 261, pp. 263, 264.

In *Lawson v. State*, 171 Ind. 431, 84 N.E. 974 (1908), the defendant was charged with and convicted of the murder of her husband, which she claimed was done in self-defense. In permitting the introduction of evidence of her improper relations with another man, the court said:

"The state clearly was entitled to place before the jury as evidence any circumstances which might suggest a possible motive on the part of the accused for perpetrating the unnatural crime of killing her husband. The jury possibly might believe from the evidence that Russell had so alienated her affections that she desired the death of her husband, and therefore was induced to kill him for that reason. Whether the evidence was sufficient to justify this belief was a matter for the determination of the jury. That it was, however, competent for the purpose for which it was introduced, is well settled." 84 N.E. 974, p. 976.

In *Kallas v. State*, 227 Ind. 103, 83 N.E. 2d 769 (1949), the State argued that the accused killed the victim because of his resistance to the unnatural advances of the accused. The court held that the accused's prior act of homosexuality and unnatural

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lust was a manifestation of an abnormal mental condition and therefore relevant to establish the motive and intention with which he killed his victim.

Based on the foregoing, we hold that the circumstances surrounding the earlier unfulfilled sexual act were relevant to establish the state of mind of appellant and the motive for the assault on the victim occurring only a short time thereafter. Such evidence also was relevant to rebut alibi testimony. The trial court did not err in admitting such testimony.

The trial court allowed into evidence items of clothing taken from defendant's home under color of a search warrant which authorized a search for shell casings.

The defendant was arrested on Tuesday, January 9, 1973, at 1:55 a. m., two days after the crime was committed. The officers obtained and executed the search warrant later the same day. Defendant had signed two consent forms authorizing the search of his car and his apartment.

During the course of the search of the apartment, the officers discovered in plain view certain items of clothing subsequently introduced into evidence at the trial. These items were part of the circumstantial evidence leading to the conviction of appellant.

At the time of the search the defendant was in custody at the Palm Beach County Jail.

Testimony showed that the police were aware of the possible existence of these items of evidence approximately three hours after the body of the victim was discovered at about 3:00 o'clock Sunday afternoon. The search was conducted at approximately 7:00 o'clock Tuesday evening. The items of clothing were discovered inadvertently, in plain view during the course of a thorough search for the cartridges, none of which were found.

Defendant's primary contention is that the seizure of the items of clothing went beyond the scope of the search warrant. Relying on the Fourth Amendment to the United States Constitution, Fla.Const., art. I, § 12, F.S.A., and Fla.Stat. § 933.07, F.S.A., defendant argues that each of these requires that warrants particularly describe the items to be seized; also, that Fla.Stat. § 933.14, F.S.A., provides for the return of property taken when it is not the same as that described in the warrant. Thus, asserts defendant, the seizure of the items of clothing, which were not fruits or instrumentalities of the crime, was error since they were not particularly described in the search warrant.

[6] The seizure of the so-called "mere evidence" of a crime is not proscribed by the Fourth Amendment. *Warden, Maryland Penitentiary v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967). In *Hayden*, the defendant was closely pursued by police officers to his home. While searching for Hayden, the police discovered in a washing machine a jacket and trousers of the type the defendant was said to have worn, and a cap was found under a mattress. This evidence was allowed over defendant's objection that it was "mere evidence" and not the fruit or instrumentality of the crime. The United States Supreme Court held that there no longer is any valid reason to distinguish seizures of "mere evidence" from seizures of "fruits, instrumentalities, or contraband". Further:

"But if its [mere evidence rule] rejection does enlarge the area of permissible searches, the intrusions are nevertheless made after fulfilling the probable cause and particularity requirements of the Fourth Amendment and after the intervention of a neutral and detached magistrate. . . ." 387 U.S. 294, pp. 319, 310, 87 S.Ct. 1642, p. 1651.

Defendant also questions why the police did not include in the search warrant an

authorization to seize the items of clothing when the testimony indicates knowledge of their existence some 48 hours prior to the execution of the search warrant.

[7] The search was conducted with the consent of the defendant and under authority of an admittedly valid warrant. A reasonable search for small items such as .38 caliber cartridges logically would lead to closets, drawers, clothes piles, and any other conceivable nook and cranny in which they could be found. Having authority and justification for being where they were, the officers were clearly warranted in seizing items found in plain view or discovered inadvertently during the course of a reasonable search of defendant's premises. There is nothing to indicate that the officers were conducting a general exploratory search or that the search for spent cartridges was a subterfuge or an excuse to conduct such a general exploratory search.

[8] Fla.Stat. § 933.18, F.S.A., restricts the issuance of a search warrant for the search of a private dwelling to certain enumerated categories of property. Defendant contends that the statute does not authorize the issuance of a warrant to search for the items of evidence that were actually seized from the defendant's dwelling, and therefore the trial court erred in denying the defendant's motion to suppress. However, the statute provides that a warrant may be issued to search a dwelling if a weapon, instrumentality, or means by which a felony has been committed is contained therein. The search warrant issued in this case authorized the seizure of "spent .38 caliber cartridge casings." We hold that the shell casings constitute an "instrumentality or means" within the meaning of Fla.Stat. § 933.18(6), F.S.A.; therefore, the warrant was not issued in violation thereof. The fact that clothing, not shell casings, was located, does not invalidate the search warrant or the search itself.

The State, in this case, should not be held to the strict requirement that only

those things particularly described in the warrant may be seized. This would fly in the face of the universally accepted "plain view" exception to the warrant requirement of the Fourth Amendment. The police are not required to close their eyes and turn their heads away from evidence inadvertently discovered during the course of a lawful search, the presence of which they had no prior knowledge. See *Coolidge v. New Hampshire*, 403 U.S. 443, 465, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). *Bretti v. Wainwright*, 439 F.2d 1042 (5th Cir. 1971).

[9] We next consider the admissibility at trial of the testimony of a witness taken at the preliminary hearing.

Johnny Jones was a material witness in the State's case against Leo Alford. He lived directly across the street from the site of the crime. On January 7, 1973, the morning of the crime, Jones heard several shots being fired and observed a yellow Dodge or Plymouth back out of the area "fast." At the preliminary hearing he gave testimony regarding the identity of a certain white hat he saw being worn by the person driving the yellow car and also regarding some photographs of the same car. This testimony was read to the jury at the trial, over the objection of the defendant.

It appears that on March 19, 1973, the witness Jones was subpoenaed to appear at the trial, which was scheduled for April 16, 1973. On April 5, 1973, Jones notified the prosecuting attorney that he was leaving town within a few days to enter a hospital in Wisconsin. On April 11, 1973, the State's motion to perpetuate Jones' testimony was granted, but no attempt was ever made to do so.

Jones left the State after advising the prosecuting attorney and refused when requested to return. It appears that there was no medical reason why the witness could not return for trial.

On the third day of the trial, the State first advised the trial judge and defendant that Jones was not available and offered to

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read the testimony given by Jones at the preliminary hearing. No attempt was made to take Jones' deposition.

The trial judge found that although there was some confusion concerning the motion to perpetuate testimony, the State tried in good faith to produce the witness and that his absence was not procured through contrivance of the State. The judge also found that counsel for defendant appeared at the preliminary hearing and was allowed full cross-examination of Jones and concluded that it would better serve the interests of justice to allow the reading to the jury of the testimony of the preliminary hearing taken before a magistrate rather than the reading of a deposition not taken before a magistrate. Further, the testimony was previewed outside the presence of the jury before being read to the jury. Finally, similar supportive testimony to that of witness Jones was given by two other competent witnesses at the trial.

Defendant takes the position that the opportunity for adequate cross-examination was not provided at the preliminary hearing because certain important witnesses and facts were not available to the defense for proper preparation for said cross-examination. Counsel also cites certain discrepancies in the testimony of Jones when compared to other witnesses whose testimony was not available or known at the preliminary hearing, resulting in prejudice to the defendant when the testimony of Jones was read to the jury and affecting his substantive rights.

Recently this Court held that a bystander could testify at trial as to his recollections of a witness' testimony at a preliminary hearing when the witness was unavailable at trial, even where no court reporter was present and no official record was made of the witness' testimony. *Richardson v. State*, 247 So.2d 296 (Fla.1971). We said that a preliminary hearing is not distinguishable from a previous trial in the application of the "former testimony" excep-

tion to the hearsay rule. In *Richardson*, as in the case *sub judice*, there existed the additional safeguard of supportive testimony given in person at the trial by two other witnesses.

All procedural and evidentiary requirements prerequisite to the introduction of the "former testimony" appear to have been met. See *James v. State*, 254 So.2d 838 (Fla.App. 1st, 1971); *Coleman v. Alabama*, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970). The testimony was admissible.

Defendant also complains because pictures of the deceased victim were admitted into evidence.

[10] When a photograph is relevant it is admissible, unless what it depicts is so shocking in nature as to overcome the value of its relevancy. *Williams v. State*, 228 So.2d 377 (Fla.1969). Therefore, relevancy is the initial determination. The defendant contends that the photographs were not relevant since no contention was made that a horrible crime had not been committed. The defense was that the defendant did not commit the crime.

[11] In his opening statement to the jury the defendant's counsel stated that he did not know whether the victim was raped, nor whether "the necessary force and violence" was used. One of the four photographs showed that the deceased had been blindfolded and had sustained numerous bullet wounds. Thus, they were relevant to prove "force and violence."

Once it has been established that the photographs are relevant, it must then be determined whether the gruesomeness of the portrayals is so inflammatory as to create an undue prejudice in the minds of the jury, and thereby overcome the value of their relevancy. We take note that the trial judge allowed in evidence only four photographs depicting the body of the victim and none of those were duplications. Additionally, the trial judge ruled inadmissible a close-up photograph of the victim's

vaginal area revealing injury to that area. This court in *Williams v. State*, *supra*, stated that "the view depicted is neither gory nor inflammatory beyond the simple fact that no photograph of a dead body is pleasant." That same rationale applies with full force herein. The pictures were admissible.

After the defendant was adjudicated guilty of the capital felony of first degree murder, a separate sentencing proceeding was conducted pursuant to Fla.Stat. § 921.141, F.S.A., which provides:

"(1) *Separate Proceedings On Issue Of Penalty.*—Upon conviction or adjudication of guilt of a defendant of a capital felony the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by section 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7) of this section. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

307 So.2d—2515

"(2) *Advisory Sentence By The Jury.*—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

"(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

"(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist, and

"(c) Based on these considerations, whether the defendant should be sentenced to life [imprisonment] or death.

"(3) *Findings In Support Of Sentence Of Death.*—Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

"(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

"(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances.

"In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with section 775.082.

"(4) *Review Of Judgment And Sentence.*—The judgment of conviction and

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sentence of death shall be subject to automatic review by the Supreme Court of Florida within (60) days after certification by the sentencing court of the entire record unless the time is extended for an additional period not to exceed (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

"(3) *Aggravating Circumstances.*—Aggravating circumstances shall be limited to the following:

"(a) The capital felony was committed by a person under sentence of imprisonment.

"(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

"(c) The defendant knowingly created a great risk of death to many persons.

"(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

"(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

"(f) The capital felony was committed for pecuniary gain.

"(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

"(h) The capital felony was especially heinous, atrocious or cruel.

"(4) *Mitigating Circumstances.*—Mitigating circumstances shall be the following:

"(a) The defendant has no significant history of prior criminal activity.

"(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

"(c) The victim was a participant in the defendant's conduct or consented to the act.

"(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

"(e) The defendant acted under extreme duress or under the substantial domination of another person.

"(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

"(g) The age of the defendant at the time of the crime."

Several witnesses were called by the defendant who testified as to his good character. The jury recommended the death penalty.

The trial judge then made his written findings of fact required by the following provisions of Fla.Stat. § 921.141(3)(b):

"(a) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances.

"(b) That in which the court imposes the death sentence, the determination of the jury shall be supported by specific written findings of fact based upon the evidence in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the

death sentence, the court shall impose sentence of life imprisonment in accordance with section 775.082."

With respect to the above-mentioned provisions he found that aggravating circumstances (d) and (h) had been established beyond a reasonable doubt, as had mitigating circumstances (a), saying:

" . . . Upon my review of both trials, of my trial notes and of the presentence investigation, I find as follows with respect to aggravating circumstances and mitigating circumstances:

"AGGRAVATING CIRCUMSTANCES—

"(a) The defendant in this case was not under sentence of imprisonment for any other crime.

"(b) The defendant has never been convicted of another capital felony or of a felony involving the use or threat of violence to another person.

"(c) The defendant did not knowingly create a great risk of death to many persons.

"(d) This capital felony of murder in the first degree was committed while this defendant was engaged in the commission of or in flight after committing a life felony which was rape and of which he was also convicted in the same trial.

"(e) This capital felony was not committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

"(f) This capital felony was not committed for pecuniary gain.

"(g) This capital felony was not committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

"(h) This capital felony was especially heinous, atrocious and cruel.

"MITIGATING CIRCUMSTANCES.—

"(a) This defendant has no significant history of prior criminal activity.

"(b) This defendant was not under the influence of extreme mental or emotional disturbance when the capital felony was committed.

"(c) The victim of this capital felony was not a participant in the defendant's conduct nor did she consent to his acts.

"(d) This defendant was not an accomplice in the capital felony committed; he was the only participant.

"(e) This defendant did not act under extreme duress or under the substantial domination of another person in the commission of this capital felony.

"(f) The capacity of this defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not substantially impaired.

"(g) The age of this defendant at the time of the commission of the crime is not a factor, he having reached his majority some years prior to the commission of the crime. . . .

"With respect to my finding that this capital felony was especially heinous, atrocious or cruel, I observe that I have been engaged in the administration of criminal justice since 1959. During that period of time I have observed a number of brutal and conscienceless crimes. Compared against that experience, the criminal acts of this defendant are particularly shocking, heinous, atrocious and cruel. In this respect, I cite the scene of the crime, the victim as depicted by photographs introduced into evidence in this case and the testimony of the pathologist describing the wounds, damage and injury occasioned to that pathetic child's body. It is inexpressibly cruel."

The court concurred in the jury's sentence of death.

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[12-18] As we noted in *State v. Dixon*, *supra*, the most important safeguard provided by Fla.Stat. § 921.141, F.S.A., is the propounding of aggravating and mitigating circumstances which must be determinative of the sentence imposed. We thoroughly analyzed these circumstances in *Dixon*, and no further elaboration is necessary. We repeat, however, that:

"The aggravating circumstances of Fla.Stat. § 921.141(6), F.S.A., actually define those crimes—when read in conjunction with Fla.Stat. §§ 782.04(1) and 794.01(1), F.S.A.—to which the death penalty is applicable in the absence of mitigating circumstances. As such, they must be proved beyond a reasonable doubt before being considered by judge or jury. . . .

"Fla.Stat. § 921.141(6)(d), F.S.A., provides that the commission of a capital felony as part of another dangerous and violent felony constitutes not only a capital felony under Fla.Stat. § 782.04(1), F.S.A., but also an aggravated capital felony. Such a determination is, in the opinion of this Court, reasonable. . . .

"The aggravating circumstance which has been most frequently attacked is the provision that commission of an especially heinous, atrocious or cruel capital felony constitutes an aggravated capital felony. Fla.Stat. § 921.141(6)(h), F.S.A. Again, we feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended. It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart

from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily tortuous to the victim.

"When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided in Fla.Stat. § 921.141(7), F.S.A. All evidence of mitigating circumstances may be considered by the judge or jury. . . .

"It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present. Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great. Thus, the discretion charged in *Furman v. Georgia*, *supra*, can be controlled and channeled until the sentencing process becomes a matter of reasoned judgment rather than an exercise in discretion at all." 283 So.2d 1, 10-11, 12.

[19] The trial judge found that the murder of the deceased victim was committed while defendant was fleeing from the commission of or in flight from the life felony of rape of a female, and that the act was especially heinous, atrocious and cruel. The mitigating circumstance was that the defendant had no significant prior criminal

record. Additionally, the evidence of defendant's guilt in these crimes was particularly strong, discounting the possibility of an "innocent" man being sentenced to die.

In *Taylor v. State*, 291 So.2d 648 (Fla., 1974), we reversed the trial court's imposition of the death sentence where, unlike the case *sub judice*, the jury recommended a life sentence. However, in *Taylor* the mitigating circumstances clearly outweighed the aggravating circumstances. Not only did Taylor have no prior history of criminal activity, but in fact he had been shot five times during the exchange of gunfire in which the decedent was fatally wounded. It also appeared that the downward trajectory of the fatal bullet raised the possibility that Taylor had not fired the shot since he was on the floor with five bullets in his body. We concluded that these factors could have substantially impaired the rationality of Taylor to the point that the jury rejected the death penalty.

In *Sullivan v. State*, 303 So.2d 632 (Fla., 1974), opinion filed November 27, 1974, the defendant committed the crime of robbery, abducted the victim, struck him with a tire iron, and shot him with both barrels of a shotgun in the back of the head. The defendant reloaded and discharged both barrels again into the victim's head. He then stated, "I don't feel no different." The defendant, 25-years old at the time, had no previous criminal record. The sentence of death was held by this Court to be appropriate.

In *Hallman v. State*, 305 So.2d 180 (Fla., 1974), opinion filed December 11, 1974, the defendant committed the crime of robbery, cut the victim about the throat and neck with broken glass, slitting her throat and causing her death. The defendant had been convicted of two previous crimes involving an assault upon a young woman

with a dangerous weapon. This Court held that the sentence of death was appropriate.

In the case *sub judice*, the victim was a 13-year-old female child. On Sunday, January 7, 1973, she was to meet a friend at a neighborhood bus stop so that the two could go to the beach together. She left her home and was last seen by a neighbor as she walked down the street. Her body was discovered lying on a trash pile. She had been raped, both vaginally and rectally, was blindfolded, and shot five or six times. The defendant was a 27-year-old male with no significant record of prior criminal activity. This was an aggravated and most indefensible crime. The condition of the body is definite proof of the commission of a conscienceless or pitiless crime which was unnecessarily tortuous to the victim. Comparing the aggravating and mitigating circumstances with those shown in other capital cases and weighing the evidence in the case *sub judice*, our judgment is that death is the proper sentence.

Pursuant to Rule 6.16(b), Florida Appellate Rules, we have reviewed the evidence to determine whether the interest of justice requires a new trial. No reversible error is made to appear and the evidence does not reveal that the ends of justice require that a new trial be awarded. We find that the judgment and sentence of the trial court in this cause is in accordance with the justice of the cause.

Accordingly, the judgment and sentence of the circuit court are hereby affirmed.

It is so ordered.

ROBERTS, McCAIN and OVERTON, JJ., concur.

ERVIN (Retired), J., dissents.

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IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. A-182

75-5706

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SUPREME COURT, U.S.

CHARLES WILLIAM PROFFITT,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

RESPONSE TO

*State of Fla*  
PETITION FOR WRIT OF HABEAS CORPUS TO THE  
SUPREME COURT OF FLORIDA

ROBERT L. SHEVIN  
Attorney General

A. S. JOHNSTON  
Assistant Attorney General

The Capitol  
Tallahassee, Florida 32304

COUNSEL FOR RESPONDENT.



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IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1975  
NO. A-182

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CHARLES WILLIAM PROFFITT,  
Petitioner,  
  
-vs-  
STATE OF FLORIDA,  
  
Respondent.

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CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida sought to be reviewed is reported as Charles William Proffitt v. State Florida, 315 So.2d 461 (Fla. 1975).

JURISDICTION

Respondent concedes that jurisdiction is properly being sought pursuant to 28 U.S.C. Section 1257(3), and to the extent that a substantial federal question is presented, this Court can exercise jurisdiction in the cause.

QUESTION PRESENTED

Whether the imposition and carrying out of the sentence of death for the crime of first degree murder under the law of Florida violate the Eighth or Fourteenth Amendment to the Constitution of the United States?

CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED

The respondent will agree that the constitutional and statutory provisions which may be involved in this case are as the petitioner has set forth in his petition for writ of certiorari on pages two (2) through seven (7).

STATEMENT OF THE CASE

The respondent will not accept the statement of the case as set forth by the petitioner on pages seven (7) through eighteen (18) of his petition for writ of certiorari.

The respondent would submit the following as an appropriate statement of the case, and the information next

appearing comes directly from the Florida Supreme Court's opinion which, as previously noted, is reported at 315 So.2d 461, and which is included as Appendix A to the petitioner's petition for writ of certiorari:

"This cause is before the Court on direct appeal from the recommendation and sentencing to death of the appellant, Charles William Proffitt, by the Circuit Court of Hillsborough County, Florida. We have jurisdiction pursuant to Article V, Section 3(b)(1), Florida Constitution.

The appellant was charged by a grand jury indictment with the murder in the first degree of Joel Ronnie Medgebow by stabbing.

The evidence produced at trial established that on the morning of July 10, 1973, at about 4:45 A.M., the decedent's wife, Patricia Kay Medgebow, was awakened, apparently by her husband's moaning. She saw her husband propped up on one elbow with what later was discovered to be a knife in his hand. Suddenly, a man jumped up and struck her in the face several times fleeing through the open sliding glass doors. Fingerprints were later found on the door, however, they did not match the appellant's prints. The decedent's wife gave a description of the assailant but, at trial, she was unable to identify the appellant as the man who struck her on the morning of the homicide. In her description of the assailant, she claimed that he was wearing a white pin-striped shirt and either brown or grey trousers. She stated that on the evening prior to the killing she had shared a marijuana cigarette with four other people.

The testimony of Michael Charles Seary, appellant's coworker, was presented to show that on the night preceding and during the morning prior to the homicide, the appellant and Seary had been out drinking until 3:30 or 3:45 A.M., and that the appellant had driven Seary home, had a brief conversation and left. Seary also stated that at the time, the appellant was wearing a short-sleeved, white Maas Brothers' shirt with a blue oval emblem over the left breast, and grey trousers.



Further testimony revealed that the appellant and his wife lived in a two-bedroom mobile home, renting the other bedroom to a Mrs. Mary Helen Bassett and her infant daughter. Mrs. Bassett testified that on the evening prior to the homicide she had waited up with the appellant's wife for his return until approximately 1:00 A. M., but finally retired prior to his arrival. Over defense counsel's objection, she testified that she was awakened about half past five on the morning of July 10, 1973, and overheard a conversation between the appellant and his wife. She admitted that she did not hear the complete unbroken conversation, hearing only intermittent segments. She stated that she heard the appellant say that he had stabbed and killed a man during an attempted robbery and that he had beaten a woman. Mrs. Bassett also stated that she had not seen the appellant during the conversation but that she had recognized his voice.

Mrs. Proffitt, appellant's wife, testified that on the evening prior to the homicide, her husband had gone to work dressed in a white Maas Brothers' shirt and grey pants and returned from work at about a quarter past five the next morning wearing the same shirt and pants but was at that time barefooted.

A droplet and a smear of human blood were found on the Maas Brothers' shirt, however, the quantity was insufficient to type. The blood found on the knife was shown to be the same type as that of the victim but no fingerprints were detectable.

Upon this evidence, the jury found the defendant guilty as charged. The second half of the bifurcated proceeding was held, at which time it was shown that the appellant had been convicted in 1967 of the crime of breaking and entering without permission. In addition, the evidence adduced at trial was reiterated and the jury then retired to consider the recommendation of sentence. Upon returning, the jury recommended that the death penalty be imposed. The trial judge then ordered a mental examination of the defendant to determine his mental condition then and at the time of the homicide. The examination revealed that at the time of the commission of the homicide, the appellant was not mentally impaired.

The trial judge then sentenced the appellant to death and this appeal ensued.

[1] Appellant has raised eleven points on appeal. Each shall be treated in the order presented."

"[11] As to appellant's eighth, ninth and tenth points on appeal, we find no reversible error. The eighth point, dealing with the excusing of a juror because of preconceived notion about the death penalty, has been discussed and disposed of many times. *Campbell v. State*, 227 So.2d 873 (Fla. 1969) et seq. Point nine relates to another comment made by counsel for the prosecution as to the chance for the rehabilitation of the appellant. Although a distasteful comment, appellant has not cited any authority holding such comment error. The crime in this case is distasteful, but to some extent fair comment is distasteful. We, therefore, again find no reversible error.

Appellant's tenth point concerns whether the trial court did not consider evidence in mitigation when it sentenced the appellant to death. The trial court has carefully set forth all the circumstances in this case, to-wit:

"AS TO AGGRAVATING CIRCUMSTANCES:

(A) That the Defendant, CHARLES WILLIAM PROFFITT, murdered JOEL RONNIE MEDGEBOW from a premeditated design and while Defendant, CHARLES WILLIAM PROFFITT, was engaged in the commission of a felony, to-wit: burglary.

(B) That the Defendant, CHARLES WILLIAM PROFFITT, has the propensity to commit the crime for which he as convicted, to-wit: Murder in the First Degree and is a danger and menace to society.

(C) That the murder of JOEL RONNIE MEDGEBOW by the Defendant, CHARLES WILLIAM PROFFITT, was especially heinous, atrocious and cruel.

(D) That the Defendant knowingly through his voluntary and intentional acts leading up to and during the course

of the commission of the offense for which he was convicted created a great risk to serious bodily harm and death to many persons.

"AS TO MITIGATING CIRCUM-  
STANCES:

The Court finds that the enumerated mitigating circumstances set forth in F. S. 921.141(6)(7) are primarily negated, in that,

(A) The Defendant, CHARLES WILLIAM PROFFITT, was convicted in 1967 of Breaking and Entering without permission.

(B) That the capital felony for which the Defendant, CHARLES WILLIAM PROFFITT, was convicted was not committed while the Defendant, CHARLES WILLIAM PROFFITT, was under the influence of extreme mental or emotional disturbance.

(C) That the victim, JOEL RONNIE MEDGEBOW, was not a participant in the Defendant's conduct nor did the victim, JOEL RONNIE MEDGEBOW, consent to the act.

(D) That the Defendant, CHARLES WILLIAM PROFFITT, was the only participant in the capital felony for which he has been convicted.

(E) That the Defendant, CHARLES WILLIAM PROFFITT, did not under extreme duress during the commission of the offense nor was he, during that period of time under the substantial domination of another person.

(F) That at the time of the commission of the offense the Defendant's capacity to appreciate the criminality to the requirements of law was not substantially impaired.

(G) The age of the Defendant, CHARLES WILLIAM PROFFITT, to-wit: age 28 years, has no particular significance and therefore is not a mitigating circumstance."

We must obviously conclude that no error was committed.

Finally, as to the appellant's eleventh point, whether the death penalty is cruel and unusual punishment, we note that this argument is meant to preserve the point for appeal, however, we are bound by our earlier pronouncement in State v. Dixon, 283 So.2d 1 (Fla.1973).

After carefully reviewing the record and briefs and after oral argument of the parties, we find that no reversible error has been shown and, therefore, the decision of the circuit court should be and is hereby affirmed." Proffitt v. State, supra pages 463, 464, 466 and 467.

HOW THE FEDERAL QUESTION  
WAS  
RAISED AND DECIDED BELOW

The respondent would submit that the petitioner adequately preserved the federal question presented in the case at bar at the appropriate times and in the appropriate Florida courts.

The history of this federal question preservation is set forth on pages fifteen (15) and sixteen (16) of the petitioner's petition for writ of certiorari.



REASONS FOR GRANTING  
THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF FIRST DEGREE MURDER UNDER THE LAW OF FLORIDA VIOLATE THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

ARGUMENT

In light of the questions left unanswered by this Court in Furman v. Georgia, 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726 (1972), and the recent action taken in Fowler v. North Carolina, Case No. 73-7031 restoring said case to the oral argument calendar, 43 L.W. 3674, June 23, 1975, it would be absurd for the undersigned or the State of Florida to suggest that this case does not present a substantial federal question with regard to the validity of Florida's death penalty statute and the sentence imposed herein pursuant thereto.

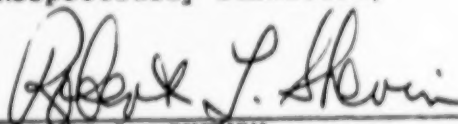
Accordingly, the State of Florida concedes that this federal question requires consideration by this Court so that it may authoritatively dispose of the merits of this issue. It should be noted that the State of Florida's position is, and will be, that the statutes involved and the judgement and sentence entered in accordance therewith are valid in all respects.

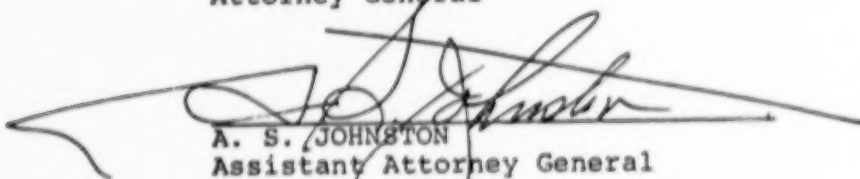
Respondent respectfully urges this Court to accept jurisdiction on this issue; to enter an order directing the parties to file their respective briefs on the merits; and to set the cause for oral argument before the Court during the October Term.

CONCLUSION

For the reasons hereinbefore advanced, the respondent agrees that this case merits review on the federal question presented and urges this Honorable Court to accept the cause for such review.

Respectfully submitted,

  
ROBERT L. SHEVIN  
Attorney General

  
A. S. JOHNSTON  
Assistant Attorney General

The Capitol  
Tallahassee, Florida 32304

COUNSEL FOR RESPONDENT

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1975

Misc. No. 75-5706

CHARLES WILLIAM PROFFITT, Petitioner

V.

STATE OF FLORIDA

AFFIDAVIT

I, CHARLES WILLIAM PROFFITT, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees:

1. I am the petitioner in the above-entitled case.
2. Because of my property I am unable to pay the costs of said cause.
3. I am unable to give security for the same.
4. I believe that I am entitled to the redress I seek in said case.
5. The nature of said cause is briefly stated as follows:

I was convicted of first degree murder and sentenced to death by the Circuit Court for Hillsborough County, Florida. I appealed the judgment of conviction and the sentence of death to the Florida Supreme Court; that court affirmed

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both the judgment and sentence. I am now petitioning for a writ of certiorari to the Supreme Court of the United States.

*Charles William Proffitt*  
Charles William Proffitt

Duly witnessed and sworn to before me, a Notary Public, this 25 day of August, 1975.

*Russell L. McLaughlin*  
Notary Public



IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1975  
No. A-182

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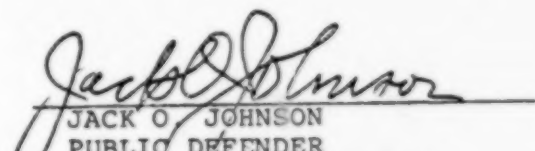
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75-5706

CHARLES WILLIAM PROFFITT,  
Petitioner,  
vs.  
STATE OF FLORIDA,  
Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner, CHARLES WILLIAM PROFFITT, by his undersigned counsel, asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of Florida without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53. The petitioner's affidavit in support of this motion is attached hereto.

  
JACK O. JOHNSON  
PUBLIC DEFENDER  
TENTH JUDICIAL CIRCUIT  
Post Office Box 1216  
Bartow, Florida 33830

DENNIS P. MALONEY  
ASSISTANT PUBLIC DEFENDER  
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ATTORNEYS FOR PETITIONER

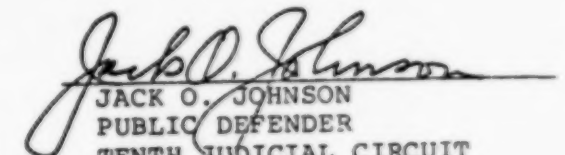
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CERTIFICATE OF SERVICE

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SUPREME COURT, U.S.

I HEREBY CERTIFY that copy hereof has been furnished to the Attorney General's Office, The Capitol Building, Tallahassee, Florida 32304; and Petitioner, #041377, Florida State Prison, P.O. Box 747, Starke, Florida 32091, by mail this 3rd day of November, 1975.

  
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ATTORNEYS FOR PETITIONER

Supreme Court, U. S.  
FILED

FEB 26 1976

THOMAS J. BRYAN, JR., CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM 1975

\_\_\_\_\_  
No. 75-5706  
\_\_\_\_\_

CHARLES WILLIAM PROFFITT,  
*Petitioner,*

v.

STATE OF FLORIDA,  
*Respondent.*

\_\_\_\_\_  
ON WRIT OF CERTIORARI TO THE SUPREME  
COURT OF FLORIDA  
\_\_\_\_\_

**BRIEF FOR PETITIONER**  
\_\_\_\_\_

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM 1975

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No. 75-5706

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CHARLES WILLIAM PROFFITT,  
*Petitioner,*

v.

STATE OF FLORIDA,  
*Respondent.*

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ON WRIT OF CERTIORARI TO THE SUPREME  
COURT OF FLORIDA

---

BRIEF FOR PETITIONER

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**OPINIONS BELOW**

The opinion of the Supreme Court of Florida affirming Petitioner's conviction of first degree murder and sentence of death by electrocution is reported at 315 So.2d 461 (Fla. 1975). The written decision of the Circuit Court of the Thirteenth Circuit in and for Hillsborough County, Florida, adjudicating Petitioner guilty and sentencing him to die is unreported.

**JURISDICTION**

The jurisdiction of this Court rests upon 28 U.S.C. §1257(3), the Petitioner having asserted below and asserting here a deprivation of rights secured by the Constitution of the United States.

The judgment of the Supreme Court of Florida was filed on May 28, 1975. The Petition for Rehearing was denied and the Mandate was final on August 13, 1975. The Petition for Certiorari was filed on November 5, 1975, and was granted on January 22, 1976.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

"Excessive bail shall not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted."

This case also involves the Due Process Clause of the Fourteenth Amendment, which provides:

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ."

It further involves the following provisions of Florida Statutes Annotated:

*Fla. Stat. Ann. § 775.082 (1973)*

*Penalties for felonies and misdemeanors*

"(1) A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than twenty-five (25) calendar years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in

section 921.141 results in findings by the Court that such person shall be punished by death, and in the latter event such person shall be punished by death.

(2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, a person convicted of a capital felony shall be punished by life imprisonment as provided in subsection (1).

(3) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1). . . ."

*Fla. Stat. Ann. § 782.04 (1973)<sup>1</sup>*

*Murder*

<sup>1</sup>This section was amended in 1974, and the statutory definition of second degree murder was altered slightly. Florida Laws 1974 c.74-383, §14 (effective July 1, 1975) enacts a new §782.04, which provides:

### *782.04 Murder*

(1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of or in the attempt to perpetrate any arson, rape, sodomy, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person eighteen years or older when such drug

(continued)



"(1) (a) The unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in

*(footnote continued from preceding page)*

is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in chapter 775.

(b) In all cases under this section the procedure set forth in §921.141 shall be followed in order to determine sentence of death or life imprisonment.

(2) The unlawful killing of a human being, when perpetrated by any act imminently dangerous to another, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in chapter 775.

(3) When a person is killed in the perpetration of, or in the attempt to perpetrate, any arson, rape, sodomy, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb by a person other than the person engaged in the perpetration of or in the attempt to perpetrate such felony, the person perpetrating or attempting to perpetrate such felony shall be guilty of murder in the second degree, which constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in chapter 775.

(4) The unlawful killing of a human being when perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than any arson, rape, sodomy, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb, shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in chapter 775."

the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of seventeen years when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in §775.082.

(b) In all cases under this section, the procedure set forth in section 921.141 shall be followed in order to determine sentence of death or life imprisonment.

(2) When perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, or when committed in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, except as provided in subsection (1), it shall be murder in the second degree, . . . punishable by imprisonment in the state prison for life or for such term of years as may be determined by the court.

(3) When perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, it shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in section 775.082."

*Fla.Stat.Ann. §921.141 (1973)<sup>2</sup>*

*Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence*

"(1) *Separate proceedings on issue of penalty.* Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by section 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before the jury impaneled for that purpose unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsection (6) and (7), of this section.<sup>3</sup>

Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured

<sup>2</sup>Subsection (1) of this statute was amended slightly in 1974 by Fla. Laws 1974, c.74-379 (effective October 1, 1974) to provide that if through "impossibility or inability," the trial jury is unable to reconvene for a hearing or sentencing, a special jury may be summoned.

<sup>3</sup>The subsection setting forth aggravating circumstances and mitigating circumstances in Fla.Stat.Ann. §921.141 (1975-1976 Supp.) however, are numbered respectively, (5) and (6).

in violation of the Constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) *Advisory sentence by the jury.* After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life . . . or death.

(3) *Findings in support of sentence of death.* Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances. In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsection (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court



shall impose sentence of life imprisonment in accordance with section 775.082.

(4) *Review of judgment and sentence.* The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) *Aggravating circumstances.*—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious or cruel.

(6) *Mitigating circumstances.*—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant, at the time of the crime."

*Fla. Stat. Ann. §922.09 (1973)*

*Capital cases*

"When a person is sentenced to death, the clerk of the court shall prepare a certified copy of the record of the conviction and sentence, and the sheriff shall send the record to the governor. The sentence shall not be executed until the governor issues a warrant, attaches it to the copy of the record, and transmits it to the warden, directing

him to execute the sentence at a time designated in the warrant."

*Fla. Stat. Ann. §922.10 (1973)*

*Execution of death sentence.*

"A death sentence shall be executed by electrocution. The warden of the state prison shall designate the executioner. The warrant authorizing the execution shall be read to the convicted person immediately before execution."

*Fla. Stat. Ann. §922.11 (1973)*

*Regulation of execution*

"(1) The warden of the state prison or a deputy designated by him shall be present at the execution. The warden shall set the day for the execution within the week designated by the governor in the warrant.

(2) Twelve citizens selected by the warden shall witness the execution. A qualified physician shall be present and announce when death has been inflicted. Counsel for the convicted person and ministers of the gospel requested by the convicted person may be present. Representatives of news media may be present under regulations approved by the head of the department of general services. All other persons except prison officials and guards shall be excluded during the execution.

(3) The body of the executed person shall be prepared for burial and, if requested, delivered at the prison gates to relatives of the deceased. If the body is not claimed by relatives, it shall be given to physicians who have requested it for dissection or be disposed of in the same manner as are bodies of prisoners dying in the state prison."

## QUESTION PRESENTED

Does the imposition and carrying out of the sentence of death for the crime of first degree murder under the law of Florida violate the Eighth or Fourteenth Amendment to the Constitution of the United States?

## STATEMENT OF THE CASE

Following a jury trial in the Circuit Court for Hillsborough County, Petitioner, CHARLES WILLIAM PROFFITT, a 28-year old indigent white man, was convicted of the murder of JOEL MEDGEBOW. A separate sentencing proceeding concluded with the recommendation by a majority of the jury that the death penalty be imposed. (R42,535) On March 21, 1974, Petitioner was sentenced by the trial judge to death by electrocution. (R60-61)

Dr. Robert Charles Hutchinson was qualified as an expert in pathology over defense counsel's objection (R225) and testified that he performed an autopsy on the body of the decedent. The doctor stated his opinion that death was caused by acute shock (R229) resulting from bleeding (R230) caused by a stab wound seven centimeters deep into the pericardium and the heart. (R226-228)

Patricia Kay Medgebow, Joel's widow, was at his apartment on 115 South Lois on July 9, 1973, and went to bed about ten o'clock that night. (R248-249) She woke up about quarter of five the next morning at the sound of a moan and saw her husband propped up on one elbow, holding what turned out to be a knife.



Suddenly a man jumped up, hit her three times in the face and fled. (R250, 251)

Mrs. Medgebow called the police. (R252) Each of the first two people she talked to listened to her story, then switched her to another line. (R261) She pulled Joel to the floor to better give him artificial respiration and cardiac massage. (R252) Then she went to an apartment across the hall to get a friend. (R252)

She noticed that the sliding glass door was open when she awoke, and believed that it was closed when she went to bed. (R252) Her assailant was a white male with light brown hair wearing a white pin-striped shirt with long sleeves rolled up and the tail out over a pair of grey or khaki trousers. (R255) The prosecutor asked Mrs. Medgebow to "look around the courtroom and see if you can recognize the person that struck you" and she replied "No, I don't see anyone." (R254)

On cross-examination, Mrs. Medgebow testified that she had been separated from her husband for two months and had visited apartment 104 on about five occasions after the separation. (R258) On account of artificial lights in the parking lot and on the wall of the apartment building, "It was quite a bit of light in there." (R260) Her assailant's shirt did not have a Maas Brothers' Department Store emblem. (R262) Defense counsel brought out discrepancies between Mrs. Medgebow's trial testimony and testimony she had given on deposition as to the intruder's physical characteristics, including the color and thickness of his hair and the size of his nose. (263-266)

Mrs. Medgebow testified that she had smoked a joint of marijuana earlier the evening of July 9, 1973, but had shared the "joint between five people." (R268) Defense counsel sought to inquire as to any connection

between the decedent's use of drugs and his death, but the prosecutor's objection was sustained, and the trial judge instructed the jury to disregard the question. (R268-269)

Ben Stinson, who lived in apartment 102 across from Joel Medgebow (R272), was awakened by Mrs. Medgebow on the morning of July 10, 1973. (R273) He went through the opening left by the sliding glass door in search of the malefactor but found nobody. (R274) The apartment had not been ransacked. (R276)

Johnny E. Perkins, a Tampa police corporal, (R278) arrived at the Medgebow apartment the morning of July 10, 1973, in response to a call. (R279) The sliding glass door was bent slightly and scratched. (R284,285) Mr. Perkins identified the knife marked state's exhibit number nine as the one he had taken from the apartment to the property room of the Tampa Police Department. (R287)

During cross-examination Perkins noted that Mr. Medgebow's watch, a stereo component set, and forty or fifty dollars in a living-room ashtray were in plain sight and were undisturbed. (R292-293) He also found \$142.00 cash in the pocket of Mr. Medgebow's blue jeans. (R293) Defense counsel asked whether Mr. Perkins found "any contraband in the apartment" (R296), but the prosecutor's objection to this question was sustained. (R298)<sup>4</sup>

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<sup>4</sup>Defense counsel sought to prove that there was present in the apartment a large quantity of marijuana. He believed the large amounts of money and marijuana in the apartment provided a motive for the death of Joel Medgebow. However, the trial judge agreed with the prosecution that there was "absolutely no connection in this case between marijuana and the death of Joel Ronnie Medgbow." (R296-297)

Stephen A. Moore, an identification technician with the Tampa Police Department, went to apartment number 104 at 115 South Lois on July 10, 1973. (R231) Mr. Moore lifted five fingerprints from a sliding glass door, four "on the inside and one . . . off the door handle on the outside." (R234)

Burt Madix, another identification expert with the Tampa Police (R237) was qualified as an expert as to fingerprint identification, without objection. (R238) On July 17, 1973, he examined the fingerprints taken from the apartment (R239) and determined that one and possibly another were clear enough for comparison purposes. (R240) Neither of the decipherable fingerprints matched the Petitioner's fingerprints. (R242-243)

Larry Roy Gedesse, a co-worker with Petitioner at Maas Brothers (R302) left work about seven or seven thirty o'clock the evening of July 9, 1973, at the same time as the Petitioner. (R303) The Petitioner was driving a white Dodge or Plymouth and met Mr. Gedesse at Ceasar's Palace, a bar on Dale Mabry Highway. (R304) When Mr. Gedesse left the bar at ten thirty or eleven, the Petitioner was still there with Michael Seary. (R305)

Michael Charles Seary, also a fellow employee at Maas Brothers (R307), arrived at the bar after work and stayed until about three in the morning of July 10, 1973. (R309) The Petitioner drove Mr. Seary to his Montgomery Avenue home in a white Dodge. (R310) The Petitioner, who had been drinking, left the Seary home at half past three or quarter till four. (R311) Mr. Seary described the Petitioner as wearing a shirt with Maas Brothers written on it, but without any stripes. (R313)

Patricia Ann Proffitt, the Petitioner's wife, (R321) was living at the DeSoto Trailer Park with her husband, Mary Bassett and Mary Bassett's daughter on July 9, 1973. (R322) The Petitioner went to work that day in a white Dodge, 1964 model, wearing his Maas Brothers uniform consisting of a white shirt and grey pants. (R323) The Petitioner returned to the trailer in the early morning of July 10, 1973. (R325) He had on the same clothes as when he left except that he was barefoot. (R326)

The trailer has a living room, a bathroom, a kitchen, two bedrooms, and a hallway. (R325) The appellant went into a bedroom, packed and left. (R326) Mrs. Proffitt then went to a telephone and called the police. (R328) She next saw the car in which her husband left the trailer at a place of business in Brooksville. *Id.*

On cross-examination, Mrs. Proffitt testified that the white, short-sleeve shirt worn by appellant when he left for work, and which he still wore on his return, has a blue oval emblem on it. (R331) Mrs. Bassett contributed one hundred dollars monthly to rent totaling two hundred dollars including utilities. (R330) The Petitioner made ninety to a hundred dollars weekly. *Id.* Mrs. Proffitt explained that her husband had abruptly left once before. (R331)

Vance Gatlin, a Tampa policeman, went to the Proffitt trailer at 5:45 A.M. on July 10, 1973, and seized a shirt and a pair of pants, which were marked as State's exhibits numbers ten and eleven, respectively. (R334)

M.O. Stamatakis, another Tampa policeman, spoke to Mesdames Bassett and Proffitt at the police station on July 10, 1973 and then went with them to the State Attorney's Office. (R340) Mr. Stamatakis sent the knife



and shirt to Washington and put them back in the property room when they were returned by mail. (R342, 343) State's exhibits nine, ten and eleven came into evidence without objection. (R346) A week before the trial, Mr. Stamatakis measured the distance between 115 South Lois and the DeSoto Trailer Park as 6.6 miles. *Id.* Over objection, he testified it had taken eleven minutes to make the drive.

Mr. R. J. Peters, a Florida Highway Patrolman, (R353) found a 1964 Dodge automobile abandoned on State Road 50 about 6:35 A.M. on July 10, 1973. (R353-355)

Paul Rene Bidez, an FBI serologist (R357), testified that the blood on the knife was human blood, type A, the same type decedent had. (R359-360) Droplets of blood on the shirt were human blood of an indeterminate type. (R361) Mr. Bidez testified that a stain had a crescent shape "as though something bloody had been wiped." (R361) Defense counsel's objection to this remark was sustained, but the prosecutor reiterated the testimony in the presence of the jury while arguing after the court had ruled. (R362)

On cross-examination, Mr. Bidez testified he was unable to determine how long the stains had been on the shirt. (R363) An examination of the knife for fingerprints yielded none. (R364)

Mary Helen Bassett and her daughter shared a trailer with the Proffitts. (R367) Over objection, Mrs. Bassett testified she awoke about half past five on July 10, 1973, and overheard a conversation between the Petitioner and his wife. (R375) The Petitioner told his wife he had stabbed a man while "burglarizing the place." (R376-377) Defense objected on hearsay grounds, was overruled and Mrs. Bassett testified to

questions Mrs. Proffitt asked the Petitioner. (R377) The Petitioner also said he struck a woman. (R379) Although Mrs. Bassett never saw the Petitioner, she was sure his was the voice she heard. (R388)

At the close of the evidence, the trial court instructed the jury that it could return verdicts of guilty of first degree murder, guilty of second degree murder, guilty of third degree murder, guilty of manslaughter, or not guilty. (R488-490) The jury found petitioner guilty of first degree murder. (R491)

A sentencing hearing was held following the verdict. The State offered into evidence a certified copy of a document from the State of Connecticut showing that petitioner had been convicted, on July 11, 1967, of breaking and entering without permission. Over objection, the document was admitted. (R495)

The State called James Crumbley, M.D., a diagnostic consultant to the Sheriff's Department, who had interviewed Petitioner in the Hillsborough County Jail on two occasions. On both occasions, the Petitioner came to Dr. Crumbley as a psychiatrist, seeking psychiatric treatment. (R503) Dr. Crumbley related the substance of his first discussion with the Petitioner:

He told me that he was quite concerned because of the feeling which he had within himself which was so overwhelming until he felt that he would do damage to people in the future, as he had already done damage to an individual that he had killed. He further went on to state that he had this uncontrollable desire which built up to a terrific degree of unbearable tension for which he fought as hard as he could and, finally, one evening after work on the way home the uncontrollable desire came again that was of such intensity that he knew that he must kill someone and that he rode

around and found a place where a patio door was open and he went in and killed a man. That he stabbed him and that he was now facing trial. (R498)

The Petitioner also requested that the doctor "obtain for him some type of psychiatric help so that he would not kill someone again." (R499)

During the second interview, the Petitioner told Dr. Crumbley "that the tension and the feeling was one which could not be resisted and that once the deed had been done, that he felt a great degree of relaxation, as though a job which had to be done... had been completed." (R499) According to the doctor, Petitioner then felt the same "uncontrollable desire" building up again, and he wanted treatment for this "emotional pressure." Dr. Crumbley considered the Petitioner to be a dangerous man. (R500)

On cross-examination, Dr. Crumbley offered the following testimony:

Q. Doctor, when you examined, or discussed with the defendant the things that you have just related to the jury, were you acting as a psychiatrist?

A. Yes, I was.

Q. Did you feel that the defendant needed psychiatric help?

A. I did.

Q. Doctor, do you have an opinion as to whether or not the defendant committed the crime for which he has just been found guilty while under the influence of extreme emotional duress?

A. I am certain that this individual was under an intense amount of uncontrollable emotional stress.

Q. So that in fact what he did in the Medgebow home he couldn't help? In this a layman's way of stating what you just stated?

A. Yes.

Q. Doctor, do you have an opinion as to whether or not the defendant committed the crime for which he has been found guilty while under an extreme mental disturbance?

A. Yes, I think it could be called that.

Q. Now, Doctor, it is fair to say that the Defendant came to you as a psychiatrist, looking for help?

A. Yes.

Q. And that he in fact recognized, at least after the fact, that he needed psychiatric treatment and was coming to you for that purpose?

A. That is correct.

Q. Is a condition such as the defendant's a condition that can be treated?

A. Yes.

Q. If treated, would the defendant still be a danger to society or to fellow inmates?

A. He would not.

Q. Doctor, is it not true that there are confinement facilities which specialize or deal in the treatment of people with the emotional disturbance that the defendant apparently has?

A. That is correct.

Q. And that when one is confined in one of these facilities the individuals in charge of the facility hopefully know how to handle the situation?

A. That's correct.

Q. And they would work and attempt to cure the individual in question?



A. Correct.

Q. Doctor, do you have an opinion as to whether or not the defendant could conform his conduct to the requirements of law, at the time he committed the offense or whether his ability to do that was substantially impaired?

A. I'm certain that at the moment and at the time that this occurred this individual was overwhelmed with the force over which he had no control and to which he must carry out the deed.

Q. So that he was unable to conform his conduct to the requirements of law?

A. That is correct. (R502-505)

The State offered no further evidence in aggravation and petitioner offered no evidence in mitigation. (R505) The court then instructed the jury that:

"...the final decision as to what punishment should be imposed or shall be imposed, is the responsibility of the Judge. However, it is your duty to follow the law which will now be given you by the Court and render to the Court an advisory sentence, based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

If you do not find that there existed any of the aggravating circumstances which have been described to you, it would be your duty to recommend a sentence to life imprisonment. If you should find one or more of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist.

If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence which should be imposed." (R529, 531, 533)

The jury's sentencing verdict stated "[t]he majority of the jury advise and recommend to the court that it impose the death penalty upon the defendant, Charles William Proffitt." (R535)

Before imposing sentence, the trial court ordered that Petitioner be examined by two psychiatrists. (R537) Both doctors concluded in their written reports that the Petitioner was mentally competent at the time of the offense and at the trial in that he was able to distinguish right from wrong.<sup>5</sup> (R44, 46)

While the trial court in the instant case had requested that the doctors determine petitioner's emotional disturbance at the time of the offense and whether his emotional and mental condition fit within any mitigating circumstances set forth in the capital punishment statute, (R542), the written evaluations failed to so determine. (R44, 46)

On March 21, 1975, the trial court concurred with the jury's finding that "the aggravating circumstances of this case far outweigh any mitigating circumstances

<sup>5</sup>Since 1902 Florida has used the "M'Naghten", or "right from wrong," standard to measure the mental condition of a defendant and his responsibility for criminal acts. *Davis v. State*, 44 Fla. 312, 32 So. 822 (1902); See, e.g. *Piccott v. State*, 116 So.2d 626 (Fla. 1959); *Van Eaton v. State*, 205 So.2d 298 (Fla. 1967), cert. dismissed 400 U.S. 801. Florida has continued to adhere to M'Naghten for lack of a better alternative." *Anderson v. State* 276 So.2d 17 (Fla. 1973).

shown to exist" (R556), and sentenced Petitioner to die. (R557, 60-61)

The court based the sentence of death upon the following written findings of fact:

**"AS TO AGGRAVATING CIRCUMSTANCES:**

(A) That the Defendant, CHARLES WILLIAM PROFFITT, murdered JOEL RONNIE MEDGE-BOW from a premeditated design and while the Defendant, CHARLES WILLIAM PROFFITT, was engaged in the commission of a felony, to-wit: burglary.

(B) That the Defendant, CHARLES WILLIAM PROFFITT, has the propensity to commit the crime for which he was convicted, to-wit: Murder in the First Degree and is a danger and a menace to society.

(C) That the murder of JOEL RONNIE MEDGE-BOW by the Defendant, CHARLES WILLIAM PROFFITT, was especially heinous, atrocious and cruel.

(D) That the Defendant knowingly through his voluntary and intentional acts leading up to and during the course of the commission of the offense for which he was convicted created a great risk of serious bodily harm and death to many persons.

**"AS TO MITIGATING CIRCUMSTANCES:**

The Court finds that the enumerated mitigating circumstances set forth in F.S. 921.141 (7) are primarily negated, in that,

(A) The Defendant, CHARLES WILLIAM PROFFITT, was convicted in 1967 of Breaking and Entering without permission.

(B) That the capital felony for which the Defendant, CHARLES WILLIAM PROFFITT, was convicted was not committed while the Defendant, CHARLES WILLIAM PROFFITT, was under the

influence of extreme mental or emotional disturbance.

(C) That the victim, JOEL RONNIE MEDGEBOW, was *not* a participant in the Defendant's conduct nor did the victim, JOEL RONNIE MEDGEBOW, consent to the act.

(D) That the Defendant, CHARLES WILLIAM PROFFITT, was the only participant in the capital felony for which he has been convicted.

(E) That the Defendant, CHARLES WILLIAM PROFFITT, did *not* act under extreme duress during the commission of the offense nor was he, during that period of time under the substantial domination of another person.

(F) That at the time of the commission of the offense the Defendant's capacity to appreciate the criminality of his conduct or to conform this conduct to the requirements of law was *not* substantially impaired.

(G) The age of the Defendant, CHARLES WILLIAM PROFFITT, to-wit: age 28 years, has no particular significance and therefore is not a mitigating circumstance." (R57-58)

Petitioner's conviction and sentence of death was affirmed by the Supreme Court of Florida. *Proffitt v. State*, 315 So.2d 461 (Fla. 1975)

**HOW THE CONSTITUTIONAL QUESTION WAS PRESENTED AND DECIDED BELOW**

Petitioner moved in the trial court to dismiss the Indictment charging him with first degree murder on the grounds that the statutes under which the



Indictment was presented<sup>6</sup> violated the Constitution of the United States. (R21-25) Petitioner argued *inter alia* that the statutes provide for "[c]ruel and/or unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution" and "deprive the [Petitioner] of life, liberty or property without due process or equal protection of law, in violation of the Fifth and Fourteenth Amendments to the United States Constitution..." (R22) Petitioner further alleged "[t]hat the use of the death penalty, pursuant to Florida Statute 921.141 by the State of Florida, contravenes the Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238, 33 L.3d.2d 346, 92 S.Ct. 2726 (1972)." and "[t]hat the use of the death penalty is cruel and/or unusual punishment in violation of the Eighth Amendment to the United States Constitution." (R23)

In his timely appeal to the Florida Supreme Court, Petitioner assigned as error the following:

"The trial court's imposition of the death penalty constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

The trial court's imposition of the death penalty constituted the arbitrary infliction of punishment so as to deprive the defendant of life without due process of law, in contravention of the Fourteenth Amendment to the United States Constitution.

The trial court erred in imposing death sentence in that the intentional extinguishing of life does not comport with human dignity.

<sup>6</sup>Fla.Stat. Ann. §§775.082, 782.04, and 921.141 (1973).

The trial court erred in imposing death sentence in that execution is a wantonly freakish, arbitrary and capricious punishment, by its nature irrevocable.

The trial court's imposition of the death penalty pursuant to *FLA.STAT.* §921.141 (1972) constituted cruel and unusual punishment and a denial of due process of law in contravention of the Eighth and Fourteenth Amendments to the United States Constitution in that the trial judge had untrammelled discretion to impose life sentence which could not be reviewed, but instead imposed sentence of death."

(R614, 615)

The questions presented by these assignments of error were argued below, *Charles William Proffitt v. State of Florida*, Fla.Sup.Ct., No. 45, 541, Appellant's Brief at 46-48. The Florida Supreme Court rejected Petitioner's constitutional claim:

"Finally, as to Appellant's eleventh point, whether the death penalty is cruel and unusual punishment, we note that this argument is meant to preserve the point for appeal, however, we are bound by our earlier pronouncement in *State v. Dixon*, 283 So.2d 1 (Fla. 1973)." *Proffitt v. State*, 315 So.2d at 467 (1975).

## SUMMARY OF ARGUMENT

Florida's non-mandatory death penalty statute permits the same excessive discretionary sentencing system condemned by *Furman v. Georgia*. The statute requires the jury, for advisory purposes only, and the trial judge, for sentencing purposes, to consider such evidence as

the court deems relevant to certain enumerated statutory aggravating and mitigating circumstances. The weight to be given such evidence and the interpretation, determination and application of the statutory enumerated circumstances, depending upon the discretion of the sentencing judge, may result in a life or a death sentence.

While the statute requires automatic review of all death sentences by the Florida Supreme Court, no statutory guidelines define the nature, scope, or purpose of its review. By limiting the review to only capital cases where the trial judge imposed death, the statute defies uniformity of application. The affirmance or reversal of a death sentence requires the exercise of standardless discretion and further permits this unique penalty to be wantonly and freakishly applied.

Florida statutes do not purport to limit the discretion reposed in the State Attorney, the grand jury, or the trial jury, or the trial jury. Nor do they standardize the application of executive clemency to the death sentence. The Florida legislature has intentionally and carefully preserved discretionary opportunities for imposition or avoidance of the extreme penalty which are, in fact, as numerous and as unregulated as in the pre-*Furman* period.

The continued infliction of the death penalty under this arbitrary and selective sentencing system is cruel and unusual punishment in violation of the Eighth Amendment and a denial of the due process of law in contravention of the Fourteenth Amendment to the United States Constitution.

## ARGUMENT

### I.

#### INTRODUCTION

In *Furman v. Georgia*, 408 U.S. 238 (1972), and its companion cases, this court ruled that "the imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Id.* at 239-240. Contemporaneously with its decision in *Furman v. Georgia*, *supra*, and upon its authority, this Court in 1972 summarily vacated a number of Florida death sentences.<sup>7</sup> The Supreme Court of Florida,<sup>8</sup> the Court of Appeals for the Fifth Circuit,<sup>9</sup> and the District Court for the Middle District of Florida,<sup>10</sup> also vacated death sentences which had been imposed under Florida's "Recommendation of Mercy" statute as

<sup>7</sup>*Anderson v. Florida*, 408 U.S. 938; *Pitts v. Wainwright*, 408 U.S. 491; *Boykin v. Florida*, 408 U.S. 940; *Brown v. Florida*, 408 U.S. 938; *Hawkins v. Wainwright*, 408 U.S. 941; *Johnson v. Florida*, 408 U.S. 939; *Paramore v. Florida*, 408 U.S. 935; *Thomas v. Florida*, 408 U.S. 935; *Williams v. Wainwright*, 408 U.S. 941.

<sup>8</sup>*Anderson v. State*, 267 So.2d 8 (Fla. 1972); *Chaney v. State*, 267 So.2d 65 (Fla. 1972); *Reed v. State*, 267 So.2d 70 (Fla. 1972); *In re Baker*, 267 So.2d 331 (Fla. 1972). See also *Donaldson v. Sack*, 265 So.2d 499 (Fla. 1972).

<sup>9</sup>*Newman v. Wainwright*, 464 F.2d 615 (5th Cir. 1972).

<sup>10</sup>*Adderly v. Wainwright*, 58 F.R.D. 389 (M.D. Fla. 1972).



invalid.<sup>11</sup> This procedure was found unconstitutional because it resulted in "the death penalty [being] inequitably, arbitrarily, and infrequently imposed."<sup>12</sup>

The Florida Legislature responded by enacting the Florida Capital Punishment Act, Laws of Florida c. 72-724, in a matter of days at a Special Session in December, 1972. This act, which authorizes the death penalty for first degree murder and for rape of a small child, was approved by the Governor on December 8, 1972, and took effect immediately.<sup>13</sup> The constitutionality of the 1972 Florida legislative reaction to *Furman* is now before the Court.

The New statute provides for a bifurcated trial in

<sup>11</sup>Fla.Stat. Ann. §919.23 (1971).

*"Recommendation to Mercy"*

(1) In all criminal trials, the jury, in addition to a verdict of guilty of any offense, may recommend the accused to the mercy of the court or to executive clemency, and such recommendation shall not qualify the verdict except in capital cases. In all cases the court shall award the sentence and shall fix the punishment of penalty prescribed by law.

(2) Whoever is convicted of a capital offense and recommended to the mercy of the court by a majority of the jury in their verdict, shall be sentenced to imprisonment for life; or if found by the judge of the court, where there is no jury, to be entitled to a recommendation to mercy, shall be sentenced to imprisonment for life, at the discretion of the court."

<sup>12</sup>*Newman v. Wainwright*, 464 F.2d at 619.

<sup>13</sup>Florida thus became the first state to enact a post-*Furman* death penalty statute. Note, *Florida's Legislative and Judicial Responses to Furman v. Georgia: An Analysis and Criticism*, 2 FLA.ST.L.REV. 108, 126 (1974).

capital cases.<sup>14</sup> A person found guilty or who pleads guilty to a capital offense receives a second trial before the same judge and the same jury to determine whether the sentence of death should be imposed.

At the second trial

"(e)vidence may be presented as to any matter that the court deems relevant to sentencing, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) ((5)?) and (7) ((6)?) of this section."<sup>15</sup>

Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements."<sup>16</sup>

Fla. Stat. Ann. §921.141(1) (1975-1976 Supp.).

Florida Statutes Annotated §921.141(5) (1975-1976

<sup>14</sup>Florida Statutes Annotated §775.082 (1975-1976 Supp.) provides a possible death penalty for a "capital felony," to be administered pursuant to the sentencing procedure established by Fla.Stat. Ann. §921.141 (1975-1976 Supp.). Florida law defines two "capital felonies": first degree murder, Fla.Stat. Ann. §782.04(1) (1975-1976 Supp.), and sexual battery committed by a defendant eighteen years of age or older upon a child, eleven years of age or younger, Fla.Stat. Ann. §794.011(2)(1975-1976 Supp.).

<sup>15</sup>The subsections setting forth aggravating circumstances and mitigating circumstances in Fla.Stat. Ann. §921.141 (1975-1976 Supp.), however, are numbered, respectively, (5) and (6).

<sup>16</sup>This subsection prohibits, however, "the introduction of any evidence secured in violation of the Constitutions of the United States or of the State of Florida."

Supp.) specifies the following "aggravating circumstances":

- "(a) The capital felony was committed by a person under sentence of imprisonment.
- (b) The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person.
- (c) The defendant knowingly created a great risk of death to many persons.
- (d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
- (e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody.
- (f) The capital felony was committed for pecuniary gain.
- (g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
- (h) The capital felony was especially heinous, atrocious or cruel,"

and §921.141(6) (1975-1956 Supp) lists the following "mitigating circumstances":

- "(a) The defendant has no significant history of prior criminal activity.
- (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- (c) The victim was a participant in the defendant's conduct or consented to the act.

- (d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.
- (e) The defendant acted under extreme duress or under the substantial domination of another person.
- (f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
- (g) The age of the defendant, at the time of the crime."

After hearing the sentencing evidence, the jury is to "render an advisory sentence to the Court, based upon the following matters:

- (a) Whether sufficient aggravating circumstances exist as enumerated . . . (in §921.141(5));
- (b) Whether sufficient mitigating circumstances exist as enumerated in . . . (§921.141(6)), which outweigh the aggravating circumstances found to exist, and
- (c) Based on these considerations, whether the Defendant should be sentenced to life or death."

Fla. Stat. Ann. §921.141(2) (1975-1976 Supp.). This sentencing recommendation is not required to be in writing, to reflect specific consideration of the statutory circumstances, to reveal the proportion of the jurors in favor of life and death, or to describe in any way the process whereby the jury arrived at its result. The "advisory sentence" does not bind the trial court, for "[n]otwithstanding the recommendation of the majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death." Fla. Stat. Ann.



§921.141(3) (1975-1976 Supp.). When the court imposes sentence, it must make "specific written findings of fact" in support of the sentence "based upon the circumstances in [Fla. Stat. Ann. §921.141(5), (6) (1975-1976 Supp.)] . . . and upon the record of the trial and the sentencing proceedings." Fla. Stat. Ann. §921.141(3)(b) (1975-1976 Supp.).

Each "judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida." Fla. Stat. Ann. §921.141(4) (1975-1976 Supp.). The statute provides no guidelines for this appellate scrutiny, and the scope of review is not clear. Executive discretion to grant or deny clemency in cases where a death sentence has been imposed remains unregulated by law.

In the case of *State v. Dixon*, 283 So.2d 1 (Fla. 1973) the Florida Supreme Court was asked to square the constitutionality of the new Florida Death penalty legislation with this Court's ruling in *Furman v. Georgia, supra*. A majority of the Florida Court concluded that the 1972 legislation was "constitutional as measured by the controlling law of this State and under the constitutional test provided by *Furman v. Georgia, supra*." *Id.*, 283 So.2d at 11.<sup>17</sup> The two

<sup>17</sup>After the Florida Supreme Court decided that it was "not in the province of this Court . . . to attempt to weigh the laws of the State of Florida in light of the separate opinions of the five justices who constituted the majority in *Furman v. Georgia* . . .", it began its analysis of the 1972 statute with the following premise:

"The mere presence of discretion in the sentencing procedure cannot render the procedure violative of *Furman v. Georgia* . . ." *Id.*, 283 So.2d at 6. "Thus if the judicial discretion possible and necessary under Fla. Stat. § 921.141,

(continued)

dissenters concluded that the new Florida legislation permitted arbitrary and discriminatory imposition of death sentences contrary to this Court's decision in *Furman*.<sup>18</sup>

The revised Florida death penalty legislation still results in the unpredictable, wanton and arbitrary imposition of death sentences due to the existence of various selective mechanisms which operate before, during, and after the sentencing of defendants charged with crimes potentially punishable by death. Despite the mandate of *Furman v. Georgia, supra*, the present Florida capital punishment statute provides "no meaningful basis for distinguishing the few cases in which . . . [the death penalty] is imposed from the many cases in which it is not." *Furman v. Georgia*,

(footnote continued from preceding page)

F.S.A., can be shown to be reasonable and controlled, rather than capricious and discriminatory the test of *Furman v. Georgia, supra*, has been met." *Id.*, 283 So.2d at 7.

<sup>18</sup>Mr. Justice Ervin stated:

" . . . I conclude that the cumulative effect of this statute is to allow essentially the same excessive discretionary system which the U.S. Supreme Court would not allow in the *Furman* line of cases." *Id.*, 283 So.2d at 14. (dissenting opinion).

Mr. Justice Boyd found that the 1972 law infused even greater discretion into the sentencing procedure than did the old "Recommendation of Mercy" statute:

"Under the old system, a majority of the twelve member jury, in the exercise of their discretion, determined the nature of the punishment. Under the new law, to the exercise of that discretion is added the opportunity for the arbitrary, completely unfettered, and final exercise of discretion by the judge . . . Clearly, the new law provides for even more discretion than the quantum thereof condemned in *Furman*." *Id.*, 283 So.2d at 26 (dissenting opinion).

*supra*, 408 U.S. at 313 (concurring opinion of Mr. Justice White).

## II.

### THE FLORIDA CAPITAL PUNISHMENT STATUTE PERPETUATES THE ARBI- TRARY AND SELECTIVE IMPOSITION OF THE DEATH PENALTY,

#### A. Sentencing Discretion in the Florida Pro- cedure Results in the Arbitrary Infliction of the Death Penalty.

After Petitioner's jury found him guilty of first degree murder, a sentencing hearing was convened. The State offered into evidence a certified copy of a document from the State of Connecticut showing that Petitioner had been convicted, on July 11, 1967, of breaking and entering without permission. Over objection, the document was admitted. (R495)<sup>19</sup>

<sup>19</sup>The relevance of this conviction is not clear. Florida Statutes Annotated §921.141(5)(b) recites as an "aggravating circumstance" that "(t)he defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence of the person." The State did not claim, however, that the Connecticut conviction qualified as such an aggravating circumstance. It was not even suggested that the 1967 crime involved the use or threat of violence to a person, much less "another capital felony."

The State then called James Crumbley, a physician with some psychiatric training (R501-502), who served as "a consultant to the Sheriff's Department for diagnostic problems" (R496-497) and who had interviewed Petitioner on two occasions.

Both interviews were at Petitioner's request and both dealt with the charges then pending against him. Both interviews lasted approximately fifteen or twenty minutes. The doctor performed no psychiatric or psychological testing of Petitioner (R501). Dr. Crumbley testified:

He told me that he was quite concerned because of the feeling which he had within himself which was so overwhelming until he felt that he would do damage to people in the future, as he had already done damage to an individual that he had killed. He further went on to state that he had this uncontrollable desire which built up to a terrific degree of unbearable tension for which he fought as hard as he could and, finally, one evening after work on the way home the uncontrollable desire came again and that was of such intensity that he knew that he must kill someone and that he rode around and found a place where a patio door was open and he went in and killed a man. That he stabbed him and that he was now facing trial.

Petitioner asked Dr. Crumbley to "[o]btain for him some type of psychiatric help." (R499)

The doctor considered Petitioner a danger to society and a potential "danger to other inmates of any prison or any facility for incarceration." (R500)

On cross-examination, defense counsel sought to establish the existence of three mitigating circum-



stances.<sup>20</sup>

Q. Doctor, do you have an opinion as to whether or not the defendant committed the crime for which he has just been found guilty while under the influence of extreme emotional duress?

A. I am certain that this individual was under an intense amount of uncontrollable emotional stress.

Q. So that in fact what he did in the Medgebow home he couldn't help; Is that a layman's way of stating what you just stated?

A. Yes.

Q. Doctor, do you have an opinion as to whether or not the defendant committed the crime for which he has been found guilty while under an extreme mental disturbance?

A. Yes, I think it could be called that.

Q. Now, Doctor, is it fair to say that the defendant came to you as a psychiatrist, looking for help?

A. Yes.

Q. And that he in fact recognized, at least after the fact, that he needed psychiatric treatment and was coming to you for that purpose?

A. That is correct.

<sup>20</sup>During cross-examination, the defense sought to establish the existence of the following "mitigating circumstances": "(t)he capital felony was committed while the defendant was under the influence of extreme mental or emotional stress" (Fla.Stat.Ann. §941.121(6)(b)); "[t]he defendant acted under extreme duress or under the substantial domination of another person" (Fla.Stat.Ann. §941.121(6)(e)); and "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired". (Fla.Stat.Ann. §941.121(6)(f).)

Q. Is a condition such as the defendant's a condition that can be treated?

A. Yes.

Q. If treated, would the defendant still be a danger to society or to fellow inmates?

A. He would not. (R502-504)

The State offered no further evidence in aggravation and Petitioner offered no evidence. (R505) After argument of counsel and instructions by the Court<sup>21</sup>, the jury returned an advisory sentencing verdict which

<sup>21</sup>The Court instructed the jury that:

"... the final decision as to what punishment should be imposed or shall be imposed, is the responsibility of the Judge. However, it is your duty to follow the law which will now be given you by the Court and render to the Court an advisory sentence, based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

If you do not find that there existed any of the aggravating circumstances which have been described to you, it would be your duty to recommend a sentence to life imprisonment. If you should find one or more of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist.

If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence which should be imposed." (R452, 454, 456)

stated simply: "A majority of the jury advise and recommend to the Court that it impose the death penalty upon the defendant, Charles William Proffitt." (R535)

There is nothing to indicate from the form of this verdict which specific aggravating circumstances were found to "sufficiently" support the recommendation.

Before pronouncing sentence, the trial court appointed two psychiatrists. At a second sentencing hearing (at which no jury was present) one psychiatrist testified and the written report of the other was introduced. At the conclusion of the hearing, the trial judge sentenced Petitioner to death (R557), and subsequently entered a written order finding the existence of four "aggravating circumstances":

"(A) That the Defendant, CHARLES WILLIAM PROFFITT, murdered JOEL RONNIE MEDGEBOW from a premeditated design and while the Defendant, CHARLES WILLIAM PROFFITT, was engaged in the commission of a felony, to-wit: burglary.

(B) That the Defendant, CHARLES WILLIAM PROFFITT, has the propensity to commit the crime for which he was convicted, to-wit: Murder in the First Degree and is a danger and a menace to society.

(C) That the murder of JOEL RONNIE MEDGEBOW, by the Defendant, CHARLES WILLIAM PROFFITT, was especially heinous, atrocious and cruel.

(D) That the Defendant knowingly though his voluntary and intentional acts leading up to and during the course of the commission of the offense for which he was convicted created a great risk of serious bodily harm and death to many persons."

(R206-27). The court also found that the statutory "mitigating circumstances" were "primarily negated" because:

(A) The defendant, CHARLES WILLIAM PROFFITT, was convicted in 1967 of Breaking and Entering Without Permission.

(B) That the capital felony for which the Defendant, CHARLES WILLIAM PROFFITT, was convicted was not committed while the Defendant, CHARLES WILLIAM PROFFIT was under extreme mental or emotional disturbance.

(C) That the victim, JOEL RONNIE MEDGEBOW, was *not* a participant in the Defendant's conduct nor did the victim, JOEL RONNIE MEDGEBOW, consent to the act.

(D) That the Defendant, CHARLES WILLIAM PROFFITT, was the only participant in the capital felony for which he has been convicted.

(E) That the Defendant, CHARLES WILLIAM PROFFITT, did *not* act under extreme duress during the commission of the offense nor was he, during that period time under the substantial domination of another person.

(F) That at the time of the commission of the offense the Defendant's capacity to appreciate the criminality of his conduct or to conform this conduct to the requirements of law was *not* substantially impaired.

(G) The age of the Defendant, CHARLES WILLIAM PROFFITT, to-wit: age 28 years, has no particular significance and therefore is not a mitigating circumstance. (R207) (emphasis was original).

In conclusion, "The Court (found) that the Defendant, CHARLES WILLIAM PROFFITT, has been and



would continue to be a danger and a menace to society and therefore must pay the ultimate penalty, death by electrocution." (R208)

1. The evidence which may be considered for sentencing purposes as well as the weight to be given to such evidence is left to discretion of the sentencing judge.

The statute requires the trial judge and jury to base their decisions upon whether "sufficient" aggravating circumstances exist and whether "sufficient mitigating circumstances exist which outweigh aggravating circumstances found to exist."<sup>22</sup> Not only is the evidence which may be presented left to the court's determination of relevance and probative value,<sup>23</sup> but the statute fails to define the term "sufficient".

The determination of what constitutes "sufficient" aggravating circumstances or "sufficient" mitigating circumstances and which set of circumstances outweighs the other is left to the sole discretion of the jury and trial judge. Both the trial judge and the jury are left with the discretion to determine what weight is to be given to each individual aggravating and mitigating circumstance. The presence or absence of any such circumstances or combination thereof does not compel any particular result. Whether a particular aggravating circumstance or circumstances will outweigh a particular mitigating circumstance or circumstances is solely within the discretion of the trial judge and jury. While the Supreme Court of Florida has held that aggravating circumstances must be established by proof beyond a

<sup>22</sup>See Fla.Stat. Ann. §921.141(2) (1975-1976 Supp.).

<sup>23</sup>Fla.Stat. Ann. §921.141(1) (1975-1976 Supp.).

reasonable doubt,<sup>24</sup> no such guidance appears in the statute nor has any standard been suggested for the proof necessary to establish mitigating circumstances.

The consideration of matters by the trial court not presented to the trial jury has been expressly approved.<sup>25</sup> The value of the jury's advisory verdict in this sentencing system is unclear but it is apparent that the trial judge has complete discretion to consider whatever evidence he determines relevant and to give such weight to the evidence as he deems appropriate.

<sup>24</sup>*State v. Dixon*, *supra*, 283 So.2d at 9.

<sup>25</sup>In *Sawyer v. State*, 313 So.2d 680 (Fla. 1975) the trial court overruled a jury recommendation of life on the basis of six "additional facts which the jury did not have during their deliberation on the advisory sentence." *Id.* at 681. The Florida Supreme Court affirmed. In *Douglas v. State*, Fla.Sup.Ct. No. 44,864 (Feb. 18, 1976), *Thompson v. State*, Fla.Sup.Ct. No. 45,107 Jan. 21, 1976), *Gardner v. State*, 313 So.2d 675 (Fla. 1975) the Florida Supreme Court approved the use or non-use of presentence investigation reports. Apparently, in Florida, the sentencing judge may obtain the report if he so desires, but it is not mandatory. In an opinion dissenting to the court's affirmance of Gardner's death sentence Justice Ervin declared:

It is...logically inconsistent to allow the trial judge to consider such extraneous matters...which are clearly not aggravating or mitigating circumstances expressly enumerated in the statute, in effect re-introducing the element of discretion in the trial judge which was abhorrent to a majority of the United States Supreme Court in *Furman* and which a majority of this Court saw barred by the operation of Section 921.141 in *Dixon*.

*Id.*, 313 So.2d at 678.

2. The interpretation, determination, and application of the statutory mitigating and aggravating circumstances is within the discretion of the sentencing judge.

The statutory aggravating and mitigating circumstances are vague, indefinite, and are susceptible to reasonably different subjective interpretation and understanding on the part of jurors and trial judges. Determinations that "the capital felony was especially *heinous*, atrocious or cruel"; "that the Defendant has no *significant* history of criminal activity"; "the Defendant knowingly created a *great* risk to *many* others"; that "the Defendant acted under *extreme* duress or under *substantial* domination of another person"; or that "the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirement of the law was substantially impaired"; clearly requires discretion in interpretation and in application. It is unrealistic to suggest that reasonable men would not or could not differ in their definition of "heinous," "sufficient," "great," "many," "extreme," or "substantial."

The trial court found at paragraph "C" of the aggravating circumstances that the murder was "especially heinous, atrocious and cruel." But the victim's death was the result of a single stab wound. (R226, 229)

The term "heinous" may be acceptably descriptive and applied by laymen or sentencing judges to any crime. When considering this particular aggravating circumstance the Supreme Court of Florida observed:

"We feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was

intended. It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoy of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such *additional acts* as to set the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *State v. Dixon, supra*, 283 So.2d at 9. (emphasis added).

In the Petitioner's case, not a single additional act "set[s] the crime apart from the norm of capital felonies." In *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975) (footnote omitted), the Court observed, "[i]t is apparent that all killings are atrocious.... Still, we believe that the Legislature intended something 'especially' heinous, atrocious or cruel when it authorized the death penalty for first degree murder." Cf., *Halliwell v. State*, 323 So.2d 557 (Fla. 1975); *Douglas v. State*, Fla. Sup.Ct. No. 44,864, (Feb. 18, 1976).

It would be difficult, if not impossible, for one to logically suggest that the conduct of the Petitioner warrants the imposition of the death sentence when compared to the conduct described in the case of *State of Florida vs Michael Lawrence Powers*<sup>26</sup> Defendant Powers was indicted for first degree murder and robbery. Upon conviction the jury recommended and the trial court imposed a life sentence. Powers entered a small convenience store, forced the proprietor to sit on a box at the rear of the store at which time Powers

<sup>26</sup>See Appendix A at A-27.



fired three shots into the victim's head killing him instantly. It appeared that Powers made statements to his brother that once he got in the store he was going to kill the proprietor. While in jail during the pendency of the trial he made numerous statements that he had intended to and was glad he shot the proprietor.

In the Petitioner's case, the trial court found as an aggravating circumstance that the Petitioner's acts "created a great risk of serious bodily harm and death to many persons."<sup>27</sup> This finding reflects a profound misunderstanding of the evils at which this particular provision was aimed. This part of the 1972 Florida Statute is directed at wanton and serious endangering of the general public, as by exploding a bomb in a public place, shooting into a crowd, or hijacking an airplane. Indeed, in a hearing before the Select Committee on the Death Penalty of the Florida House of Representatives, Committee Chairman Jeff D. Gautier summarized this provision: "The defendant knowingly created risk of death to many persons. That's your hijacking sections (sic)."<sup>28</sup> This "aggravating circumstance" was patently inapplicable to this case, since during the course of the crime petitioner came into contact with only one other person besides the victim. There was no evidence to indicate that the Petitioner used or attempted to use the knife on any other person.

The arbitrary application of "great risk to many persons" as well as "especially heinous, atrocious or cruel" is illustrated when Petitioner's conduct is

<sup>27</sup>Fla.Stat.Ann. 921.141(5)(c) (1975-1976 Supp.) does not list a great risk of "serious bodily harm" to many persons as an aggravating circumstance.

<sup>28</sup>Hearings, Select Committee on the Death Penalty, Florida House of Representatives, at 66 (Aug. 4, 1972).

compared with that of John Lee Gentry<sup>29</sup>. Gentry had a domestic quarrel with his common law wife. The victim ran into an adjoining room where her mother was seated and jumped into her mother's lap seeking protection. The defendant ran into the room brandishing a large butcher knife. Another occupant of the room stood up and asked the defendant what he was doing whereupon the defendant cut the occupant with the butcher knife, declaring that "I am going to kill all three of you". He then stabbed the victim twice in the chest as she sat cuddled in her mother's arms. Gentry was convicted of first degree murder, and the trial jury recommended and the trial judge imposed a life sentence. In one of the few cases where the trial judge explained the imposition of the life sentence he stated:

"[I]t is indeed difficult to take the position that first degree murder from a premeditated design is not especially heinous, atrocious or cruel when the defendant, after a domestic dispute takes a butcher knife and chases the woman with whom he has lived into another apartment and plunges the knife into her chest while he threatened to kill the victim. Then he calmly walks from the apartment as if nothing had occurred."

In *State v. Dixon, supra*, The Florida Supreme Court recognized the danger of overly broad interpretations of "great" and "many", but expressed the hope that the trial judges would avail themselves of "ordinary intelligence and knowledge":

Likewise, *Fla. Stat. §921.141(6)(c)*, F.S.A. provides the death penalty for one who is convicted

<sup>29</sup>Appendix A at A-16.

of a capital felony in which he knowingly created a great risk of death to many persons. The use of the adjectives "great" and "many" is attacked as vague, but we feel that a man of ordinary intelligence and knowledge easily conceives the concepts involved. *Id.* 283 So.2d at 9.

It is clear that the trial court in the Petitioner's case gave little or no weight to the evidence of support of the mitigating circumstances. Surely the single seven year old conviction for breaking and entering without permission could properly support the conclusion that "the defendant had no significant history of prior criminal activity". Yet the Court interpreted, determined, and applied the word "significant" to mean a single conviction.

The testimony of Dr. Crumbley, the State's witness, indicates that the Petitioner was "under an intense amount of emotional stress and was able to conform his conduct to the requirement of law". (R504-505) The trial judge clearly disregarded this testimony but we submit that the testimony could properly support a finding of the existence of the mitigating circumstance that the crime was committed while the defendant was under the influence of "extreme mental or emotional disturbance"<sup>30</sup>, or that "the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired"<sup>31</sup>. Another sentencer may have accepted this evidence and found the existence of such mitigating circumstances and that such mitigating

<sup>30</sup>Fla.Stat. Ann. §921.141(6)(e) (1975-1976 Supp.)

<sup>31</sup>Fla.Stat. Ann. §921.141(6)(f) (1975-1976 Supp.)

circumstances outweighed one or all of the aggravating circumstances. It is apparent therefore that since judicial discretion is essential in interpreting, determining, and applying the enumerated statutory "circumstances", uniformity of the imposition of the death penalty is precluded.

**3. The circumstances which may be considered in support of the death penalty are left to the discretion of the sentencing judge.**

While the Florida Supreme Court has asserted that the most important safeguard provided by *Fla. Stat.* §921.141 is the propounding of aggravating and mitigating circumstances which must be determinative of the sentence imposed,<sup>32</sup> the trial court in its findings of fact in support of the death penalty included in paragraph "A" of the aggravating circumstances, the murder was premeditated. But premeditation is not listed as an aggravating circumstance.<sup>33</sup> The

<sup>32</sup>*Alford v. State*, 307 So.2d 433, 444 (Fla. 1975); *State v. Dixon*, *supra*, 283 So.2d at 8.

<sup>33</sup>Perhaps "premeditation" is not listed as an aggravating circumstance in the statute because all capital murders, with the exception of capital felony murders, necessarily are premeditated murders. Yet Fla.Stat. Ann. §921.141(5)(d) (1975-1976 Supp.) provides in essence, that all felony murders are aggravated murders.

*State v. Dixon*, established a presumption: "When one or more aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more mitigating circumstances . . ." *Id.*, 283 So.2d at 9.

If the trial judge in the Petitioners case is correct in finding this murder aggravated for the reason it was premeditated then *all* capital murders are, *a priori*, aggravated murder unless there are counter balancing mitigating circumstances.



jury found Petitioner guilty, as charged, of premeditated murder. Their verdict did not reflect a specific finding that the murder was committed while Petitioner was engaged in the perpetration of the felony of burglary. Yet, the trial court found that the Petitioner committed this premeditated murder while "engaged in the commission of a burglary." This speculative conclusion was listed as an aggravating circumstance. Assuming, arguendo, that the judge's discretionary determination is supported by the record it is clear why this particular felony murder is any more aggravated than the many of which life sentences have been imposed<sup>34</sup> or in which the Florida Supreme Court has vacated the death penalty.<sup>35</sup>

<sup>34</sup>See, e.g., *Hernandez v. State*, 323 So.2d 318 (Fla.App. 1975); *Wilson v. State*, 306 So.2d 513 (Fla. 1975); *Miller v. State*, 300 So.2d 53 (Fla.App. 1974); *Jefferson v. State*, 298 So.2d 465 (Fla.App. 1974); *Williams v. State*, 297 So.2d 67 (Fla.App. 1974); *Dinkens v. State*, 291 So.2d 122 (Fla.App. 1974); capital defendants have also been convicted of second degree murder in felony murder situations, see, e.g., *Ballard v. State*, 323 So.2d 297 (Fla.App. 1975); *Gilbert v. State*, 311 So.2d 385 (Fla. App. 1975).

<sup>35</sup>See *Taylor v. State*, 294 So.2d 648 (Fla. 1974); *Swan v. State*, 322 So.2d 485 (Fla. 1975); *Slater v. State*, 316 So.2d 539 (Fla. 1975); *Thompson v. State*, Fla.Sup.Ct.No. 45,107 (Jan. 21, 1976). In *Swan*, for example, the defendant and a companion burglarized a home at night and gave the forty-nine year old house keeper such a "severe beating," 322 So.2d at 486, that she died from "the torture . . . [defendant Swan] administered," 322 So.2d at 487. The Florida Supreme Court nevertheless held that considering "the total record, we are of the opinion that there were insufficient aggravating circumstances to justify the imposition of the death penalty." 322 So.2d at 489. The

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In paragraph "B" of the aggravating circumstances the trial court finds, beyond a reasonable doubt, that Petitioner "has the propensity to commit the crime for which he was arrested . . . [making him] a menace to society." None of the criteria, specified as exclusive by *Fla. Stat.* §921.141, embrace any concept of "propensity".

Moreover, the determination that petitioner had a "propensity" to commit murder and that he was a "menace to society" is not supportable as a "finding of fact" since there is no basis in the record for it and since it is not clear that it is *possible* to make such a determination. There is extraordinary disagreement among medical experts and social scientists about whether and the extent it is possible to predict future anti-social behavior on the part of a particular individual.<sup>36</sup>

The Florida Supreme Court has squarely held that the aggravating circumstances which justify a death

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burglary-murder here (in which the deceased was stabbed once) seems clearly less aggravating than that which occurred in *Swan*.

In *Thompson* the Defendant entered a restaurant for the purpose of robbing the proprietor. During the course of the robbery the defendant and the proprietor struggled over a knife. The proprietor broke away from the defendant and ran from the restaurant. The defendant chased the proprietor, caught him and stabbed him several times from which wounds he died. The defendant then entered the restaurant, grabbed the bills from the cash register and ran away. The trial court's sentence of death was reversed.

<sup>36</sup>See generally Rosen, *Detection of Suicidal Patients An Example of Some Limitations in the Prediction of Infrequent Events*, 18, J. CONSULTING PSYCH. 398, 398 n.4 (1954);

sentence need not be those specified in §921.141 and that a death sentence may be affirmed on the basis solely of non-statutory "aggravating circumstances". In *Sawyer v. State*, 313 So.2d 680 (Fla. 1975), the trial court overruled a jury recommendation of a life sentence for a first degree murder and imposed a death sentence partially on the basis of information which had not been presented to the jury. The trial judge's opinion listed six "additional facts which the jury did not have during their deliberation on the advisory sentence." 313 So.2d at 681, to justify imposition of the death sentence. The Florida Supreme Court recast these findings in terms of "aggravating circumstances" (although not "aggravating circumstances" iterated in §921.141) and affirmed appellant Sawyer's death sentence.

In response to Petitioner's suggestion that *Fla. Stat* §921.141 was incorrectly applied in his case, the Florida Supreme Court observed, without further comment, that "[o]bviously . . . no error was committed." *Proffitt v. State*, *supra* at 467. It is clear from the case, however, that the statute does not lend itself to uniform interpretation and application even to men of "ordinary intelligence and knowledge." *State v. Dixon*, *supra*, 283 So.2d at 9. Indeed, the number of possible aggravating circumstances for which a capital defendant may be condemned is bounded only by the ingenuity of trial judges, and the listing of "aggravating circumstances" in §921.141. does "no more than suggest some subject of the jury [and trial judge] to consider during . . . [their] deliberation." *McGautha v.*

*California*, 402 U.S. 183 at 207 (1971).<sup>37</sup>

Broad discretionary power is reposed in the trial judge to impose the sentence of death under this statute. To illustrate we direct the Court's attention to *State v. Peoples*<sup>38</sup> The judge who sentenced the Petitioner to die was the same trial judge who presided in the *Peoples* case. From the evidence it appears that Peoples armed himself with a rifle and stationed himself at a second story window across the street from his girl friend's home where she was sitting with the victim, a young man. From his vantage point, Peoples shot the victim in the head with a rifle. The jury returned a verdict of guilty, and upon consideration of the evidence, recommended the imposition of the death sentence. In spite of the jury's finding, the State Attorney stipulated that there were no aggravating circumstances. The Court made no express findings of fact and sentenced Peoples to life imprisonment. It is difficult for a reasonable man to reconcile the imposition of a death sentence for Petitioner's conduct, *under this statute*, and the life sentence imposed on defendant Peoples. Both juries recommended death. The judge, in the exercise of his discretion, sentenced Peoples to life and Proffitt to death.

The number of factors in aggravation and mitigation which the jury and trial judge may consider in deciding whether to take the defendant's life is unlimited. With no practicable limitations on the factors or circum-

<sup>37</sup>It is instructive that the above quoted language from *McGautha v. California*, *supra*, was written about the American Law Institute Model Penal Code, §210.6 (Official 1962) after which Fla.Stat.Ann., Sec. 921. 141 (1972) was clearly patterned.

<sup>38</sup>See Appendix A at A-65.



stances which may be considered by the sentencer in determining whether to impose the death sentence, uniformity in the imposition and application of this most extreme penalty cannot exist.

4. The death penalty may be applied in any capital crime depending upon the discretion of the sentencing judge.

This Court has long recognized the difficulty of laying down exact rules for the infliction of the death penalty.<sup>39</sup> In *McGautha v. California*, *supra*, 402 U.S. at 197, the Court observed that: "history reveals continual efforts, uniformly unsuccessful, to identify before the fact those homicides for which the slayer should die." The factors which are relevant to sentencing are simply too multifarious and elusive for precise and exhaustive definition.<sup>40</sup> Simultaneous with

<sup>39</sup>*Winston v. United States*, 172 U.S. 303, 312-13 (1899).

<sup>40</sup>Justice Harlan observed in *McGautha*:

It is apparent that such criteria [sentencing standards] do not purport to provide more than the most minimal control of the sentencing authority's exercise of discretion. They do not purport to give an exhaustive list of the relevant considerations or the way in which they may be affected by the presence or absence of other circumstances. They do not even undertake to exclude constitutionally impermissible considerations. And, of course, they provide no protection against the jury determined to decide on whimsy or caprice. 401 U.S. at 207 (footnote omitted).

The same conclusion was reached in ROYAL COMMISSION ON CAPITAL PUNISHMENT, ¶595: "No formula is possible that would provide a reasonable criterion for the infinite variety  
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*Furman v. Georgia*, and upon its authority the Court reaffirmed its conclusion by holding death sentences unconstitutional despite the fact that they were imposed under systems that provided for bifurcated trials in capital cases,<sup>41</sup> and provided standards for the

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of circumstances that may affect the gravity of the crime of murder. Discretionary judgement on the facts of each case is the only way in which they can be equitably distinguished. This conclusion is born out by American experience: there the experiment of degrees of murder, introduced long ago, had to be supplemented by giving to the courts a discretion that in effect supersedes it."

Chief Justice Burger in his dissent to *Furman* agreed that suitable sentencing standards could not be devised. 408 U.S. at 401. Moreover, he added:

"But even assuming that suitable guidelines can be established, there is no assurance that sentencing patterns will change so long as juries are possessed of the power to determine the sentence or to bring in a verdict of guilt on a charge carrying a lesser sentence; juries have not been inhibited in the exercise of these powers in the past. *Id.*"

<sup>41</sup>At the time of *Furman*, six states provided for bifurcated trials in capital cases: CAL.PENAL CODE, §190.1 (Deering 1966); CONN.GEN.STAT.ANN. §53-10 (1960); GA. CODE ANN. §27-2534 (1972); N.Y. PENAL LAW §§125.30, .35 (McKinney 1967); PA.STAT.ANN. tit. 18, §4701 (1963); TEXAS CODE CRIM.PROC.ANN. art 37.07 (1966). Four of these states had capital cases before the United States Supreme Court, and the death sentence in each case was reversed. *Davis v. Connecticut*, 408 U.S. 935 (1972); *Jackson v. Georgia*, 408 U.S. 238 (1972); *Scoleri v. Pennsylvania*, 408 U.S. 934 (1972); *Phelan v. Brierley*, 408 U.S. 939 (1972); *Matthews v. Texas*, 408 U.S. 940 (1972); *Curry v. Texas*, 408 U.S. 939 (1972); *McKenzie v. Texas*, 408 U.S. 938 (1972). New York had no case before the Court and California had, shortly before *Furman* ruled the state's death  
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exercise of sentencing discretion.<sup>42</sup> The Court drew no

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penalty unconstitutional. *People v. Anderson*, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal.Rptr. 152 (1972); see *Aikens v. California*, 406 U.S. 813 (1972).

<sup>42</sup>In Connecticut, for example, pre-*Furman* law provided for a separate penalty trial in capital cases, at which "[e]vidence may be presented . . . on the issue of penalty, of the circumstances surrounding the crime, of the defendant's background and history, and of any facts in aggravation or mitigation of the penalty." CONN.GEN.STAT.ANN. §53-10 (1960), as amended, §53a-46 (1972). The determination of penalty had to be made "on the evidence presented." CONN.GEN.STAT.ANN. §53-10 (1960), as amended §53a-10 (1972). Despite these sentencing standards, this Court vacated death sentences in Connecticut capital cases after *Furman*. E.g., *Davis v. Connecticut*, 408 U.S. 935 (1972); *Delgado v. Connecticut*, 408 U.S. 940 (1972).

In Illinois, pre-*Furman* law provided that a defendant "was entitled to have his punishment determined upon evidence limited to the facts and circumstances of that crime." *People v. Black*, 10 N.E.2d 801, 804 (Ill. 1937). Furthermore, "[it] was also the duty of the jury to fix the penalty from a consideration of all the circumstances, including the heinousness, atrocity, and cruelty of the crime. . . ." *People v. Sullivan*, 177 N.E. 733, 736 (Ill. 1931). See also *People v. Winchester*, 185 N.E. 580 (Ill. 1933); *People v. Cassler*, 163 N.E. 430 (Ill. 1928). A trial judge could reduce a jury-imposed death sentence, ILL.REV.STAT. ch. 38, §1-7-(c)(1)(1972); see note infra, and the state appellate courts could also modify a sentence of death to life imprisonment. Nevertheless, this Court vacated death sentences in Illinois capital cases after *Furman*. E.g., *Hurst v. Illinois*, 408 U.S. 935 (1972); *Moore v. Illinois*, 408 U.S. 786 (1972).

In Nebraska, pre-*Furman* law provided that, in its decision of the death penalty, a jury "had no right to be actuated by considerations of mercy but should be guided alone by the evidence, the facts, and the circumstances disclosed by the

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distinction between those two cases where the sentencing discretion was vested and exercised solely by the

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record. . . ." *Sundahl v. State*, 48 N.W.2d 689, 701 (Neb. 1951); see *Dinsmore v. State*, 85 N.W. 445 (Neb. 1901). Nebraska also provided for appellate review of death sentences. See *Sundahl v. State*, 48 N.W.2d 689 (Neb. 1951). Regardless of these protections this Court vacated death sentences in Nebraska capital cases. E.g., *Pope v. Nebraska*, 408 U.S. 933 (1972); *Alvarez v. Nebraska*, 408 U.S. 937 (1972).

In New Jersey pre-*Furman* law provided that a recommendation of imprisonment had to be "upon and after the consideration of all the evidence." N.J. STAT. ANN. §2A:113-4 (1969). "including the evidence relative to the background and mental and emotional abilities and disabilities of . . . defendant's." *State v. Reynolds*, 195 A.2d 449, 461 (N.J. 1963). See also *State v. Mount*, 152 A.2d 343 (N.J. 1959). Capital sentences imposed under New Jersey law were vacated by this Court. E.g., *Billingsley v. New Jersey*, 408 U.S. 934 (1972); *In re Reynolds*, 408 U.S. 934 (1972).

In Ohio, pre-*Furman* law provided that the jury's right to recommend mercy was bound by "the facts and circumstances described by the evidence." *State v. Tudor*, 95 N.E.2d 385, 390 (Ohio 1950). It was further provided that the jury "'must not be motivated by sympathy or prejudice. . . ." *State v. Eaton*, 249 N.E.2d 897, 907 n.4 (Ohio 1969). See also *Howell v. State*, 131 N.E. 706 (Ohio 1921). Nevertheless, capital sentences imposed under Ohio law were vacated. E.g., *Carter v. Ohio*, 408 U.S. 936 (1972); *Duling v. Ohio*, 408 U.S. 936 (1972); *Bryson v. Ohio*, 408 U.S. 938 (1972).

In Tennessee, pre-*Furman* law provided that the penalty for murder was death, but that "the jury may, if they are of the opinion that there are mitigating circumstances, fix the punishment at [from twenty years to life imprisonment]." TENN. CODE ANN. §39-2406 (19-5). The jury was instructed in these terms and was to make a finding of mitigating

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trial judge<sup>43</sup> and those cases where the trial judge had authority to overturn a jury recommendation as to sentence.<sup>44</sup>

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circumstances "by a consideration of the evidence and upon a finding of facts creating such opinion." *Woodruff v. State*, 51 S.W.2d 843, 847 (Tenn. 1932). This Court vacated Tennessee capital cases in the wake of *Furman*. E.g., *Herron v. State*, 456 S.W. 873, 879 (Tenn. 1970), vacated mem., 408 U.S. 937 (1972), wherein the Tennessee Supreme Court had upheld the death sentence on the grounds that "the evidence wholly fails to show mitigating circumstances." See also *State v. Dixon*, 283 So.2d 1, 15-16 (Fla. 1973) (Ervin, J., dissenting).

<sup>43</sup>*Alford v. Eyman*, 408 U.S. 939 (1972); *Janovic v. Eyman*, 408 U.S. 934 (1972); *Kruchten v. Eyman*, 408 U.S. 934 (1972); *Alvarez v. Nebraska*, 408 U.S. 937 (1972); *Menthen v. Oklahoma*, 408 U.S. 940 (1972); *Phelan v. Brierley*, 408 U.S. 939 (1972); *Fesmire v. Oklahoma*, 408 U.S. 935 (1972); *Morford v. Hocker*, 408 U.S. 934 (1972); *Delgado v. Connecticut*, 408 U.S. 940 (1972); *Cunningham v. Warden*, 408 U.S. (1972); *Gilmore v. Maryland*, 408 U.S. 940 (1972); *Johnson v. Maryland*, 408 U.S. 937 (1972); *Mefford v. Warden*, 408 U.S. 935 (1972); *Miller v. Maryland*, 408 U.S. 934 (1972); *Pope v. Nebraska*, 408 U.S. 933 (1972); *Staten v. Ohio*, 408 U.S. 938 (1972); *White v. Ohio*, 408 U.S. 939 (1972); *Brickhouse v. Slayton*, 408 U.S. 938 (1972); *Fogg v. Slayton*, 408 U.S. 937 (1972).

<sup>44</sup>In several cases overturned, the jury could make a binding recommendation of death, but a recommendation of mercy could be overridden by a judge. *Seency v. Delaware*, 408 U.S. 939 (1972); *Steigler v. Delaware*, 408 U.S. 939 (1972); *Kelbach and Lance v. Utah*, 408 U.S. 935 (1972). In several others cases overturned, the jury could make a binding recommendation of mercy, but a recommendation of death could be overridden by a judge. *Hurst v. Illinois*, 408 U.S. 935 (1972); *Moore v. Illinois*, 408 U.S. 786 (1972); *Arrington v. Maryland*, 408 U.S. 938 (1972); *Bartholomey v. Maryland*, 408 U.S. 937 (1972); *Strong v. Maryland*, 408 U.S. 939 (1972); *Tull v. Warden*, 408 U.S. 939 (1972).

The Florida Capital Punishment Act incorporates many, if not all, of these defects. Nevertheless, the Supreme Court of Florida determined that the statute does not violate the Eighth or Fourteenth Amendments of the United States Constitution because:

"The mere presence of discretion in the sentencing procedure cannot render the procedure violative of *Furman v. Georgia*, *supra*; it was, rather, the quality of discretion and the manner in which it was applied that dictated the role of law which constitutes *Furman v. Georgia*, *supra*.

Thus, if the judicial discretion possible and necessary under Fla. Stat. §921.141, F.S.A. can be shown to be reasonable and controlled rather than capricious and discriminatory, the test of *Furman v. Georgia*, *supra*, has been met. . . . *State v. Dixon*, *supra*, 283, So.2d at 6, 7.

Experience has shown that the test has not been met . . . "Sentencing under the Fla. Stat. Ann. 921.141 has not been "reasonable and controllable" but instead has been unpredictable.<sup>45</sup>

<sup>45</sup>At a 1972 legislative hearing before the Select Committee on the Death Penalty of the Florida House of Representatives, the Attorney General of Florida foresaw such a result when he warned of the constitutional problems that could arise from the enactment of a statute which sought to eliminate sentencing arbitrariness by enacting sentencing standards: "General Shevin. . . . 'What I'm concerned about is that you're still giving the jury the option of going back and deciding; and I think again with almost unbridled discretion, whether or not to impose the death penalty. . . . I think [this] is just a little bit chancy [sic] as to whether the court would sustain it or strike it. It's awfully sophisticated and I think just for that reason, I think when it comes before the Court on the attack, that all they're doing here

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The seventy-five histories included in Appendix A for the Court's review describe eighteen death sentence case.<sup>46</sup> The jury recommended and the trial judge imposed the death sentence in eight instances.<sup>47</sup> On ten occasions the trial judge imposed the death sentence notwithstanding the jury's recommendation of life.<sup>48</sup> In two cases the trial judge imposed life sentences where the jury recommended death.<sup>49</sup> Twenty-nine life sentences were imposed for capital crimes where the jury recommended life sentences,<sup>50</sup> and eleven life sentences were imposed in exchange for negotiated pleas of guilty to the charged capital crimes.<sup>51</sup> All defendants were convicted of capital crimes. Eighteen

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is letting the jury go back and again decide all this on a discretionary basis. I'm just afraid the Court may not see the sophistication and go ahead and strike the statute." *Hearings, Select Committee on the Death Penalty, Florida House of Representatives, at 20-21 (August 9, 1972).*

<sup>46</sup>Admittedly the case histories are incomplete. All capital crime convictions are not reported. Those where capital crime was charged and negotiated to a lesser offense or a jury verdict to a lesser offense are not included. The petitioner does not have access to all of the information necessary to submit a complete case history.

<sup>47</sup>A-33; 34; 51; 52; 56; 58, 62; 63.

<sup>48</sup>A-1; 2; 37; 38; 53; 55; 60; 67; 83.

<sup>49</sup>A-22; 65.

<sup>50</sup>A-4; 6; 8; 10; 11; 12; 13; 15; 16; 18; 20; 24; 27; 29; 31; 40; 42; 43; 45; 46; 67; 72; 75; 77; 79; 81; 86; 88.

<sup>51</sup>A-26; 32; 42; 50; 58; 66; 71; 89; 90; 91; 92. Doubtless, many capital defendants who pleaded guilty in exchange for life sentences did not appeal their convictions. This Appendix does not include those cases.

will die and fifty-seven will live. Since written findings in support of life sentences are not required it is pure speculation to suggest that the offenses for which the eighteen must die are truly distinguishable from the fifty-seven who will live. All were sentenced for capital crimes under the same statute.

The death penalty statute is not mandatory: it does not require the penalty of death for any particular conduct. Rather, it relies upon "aggravating" and "mitigating" circumstances to ferret out for execution only those guilty of "(t)he most aggravated and unmitigated" crimes.<sup>52</sup> But the iteration of "aggravating" and "mitigating" circumstances does not so limit sentencing discretion that the factual situation supporting a sentence of imprisonment will not also support a sentence of death. Indeed, if anything, this procedure is more arbitrary than the previous one.

"In point of fact, a death sentence could be imposed although the entire twelve member jury had recommended a life sentence. Likewise, the judge could impose a life sentence although the entire jury had recommended death.

Under the old system, a majority of the twelve member jury, in the exercise of their discretion, determined the nature of the punishment. Under the new law, to the exercise of that discretion is added the opportunity for arbitrary, completely unfettered, and final exercise of discretion by the judge. Clearly, the new law provides for even more discretion than the quantum thereof condemned in *Furman*."

*State v. Dixon, supra*, 283 So.2d at 26 (dissenting opinion of Mr. Justice Boyd).

<sup>52</sup>*State v. Dixon, supra*, 283 So.2d at 7.



The enumerated aggravating and mitigating circumstances are amenable to reasonably different subjective interpretations in accord with the different background, educations, personality patterns, and prejudices of the various persons responsible for the application of the standards.<sup>53</sup>

The matter of "weighing" the factors and determining their "sufficiency" is left to undirected discretion of the individual jurors and trial judge. Depending upon the jurors and judges, their biases or lack of them, and their uneven feelings about one factor as opposed to another, the decision that a defendant shall live or die is made. The possibilities of variation in the process of "weighing" and appraising factors are limitless, and thus death sentences imposed in this fashion will be discretionarily imposed. One jury or trial judge may find one aggravating factor "sufficient" to warrant the death sentence while another finds it insufficient. One mitigating factor of great weight in a particular jury's or juror's or judge's view may be deemed "sufficient" to "outweigh" two aggravating factors while others may view it differently. The meaning of the word "sufficient" is nowhere developed in the statute, yet it is obviously the core of the matter. For what may be sufficient basis to one jury or trial judge to give death may not be sufficient

<sup>53</sup>The same facts that could be taken to justify a finding of aggravation under §921.141(5)(d) ("an accomplice in the commission of . . .") could be differently interpreted in support of a finding of mitigation under §921.141(6)(d) ("an accomplice in the capital crime . . .").

to another.<sup>54</sup> The jury's advisory sentencing verdict introduces unnecessary discretion into the sentencing procedure because the statute gives no guidance regarding its relevance.<sup>55</sup> The verdict is merely an

<sup>54</sup>Unfortunately, the statute does not provide a uniform procedure for sentencers to follow when weighing the aggravating and mitigating circumstances. The majority in *Dixon* stated that "the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances. . . ." at 10. But if it is not a counting process, what is it? Without some legislative formulation of the combination of circumstances that justify executing or not executing a defendant, the decision to execute is a function of the sentencer's discretion and nothing more. There are three reasons why the mere requirement that the sufficiency of the aggravating and mitigating circumstances be weighed does not effectively limit the sentencer's discretion. First, nowhere in the statute is the meaning of the word "sufficient" developed, yet it is obviously the core of the matter. Secondly, the statute fails to assign, or even indicate, the relative weights of the various enumerated circumstances. Finally, the statute does not ordain what combination of mitigating circumstances will outweigh what combination of aggravating circumstances.

Note, *Florida's Legislative and Judicial Responses to Furman v. Georgia: An Analysis and Criticism*, 2 FLA.ST.L.REV. 108, 139-40 (1974) (Footnote omitted).

<sup>55</sup>*Thompson v. State*, (Fla. Sup. Ct. slip opinion filed Jan. 21, 1976)

This court is well aware that the recommendation of sentence by the jury is only advisory and is not binding on the trial court. However, the advisory opinion of the jury must be given serious consideration, or there would be no reason for the legislature to have placed such a requirement in the statute. Obviously, some trial judges will afford great deference to the jury recommendation, while others will not.

enigmatic statement that the majority recommended life or death. the basis for the recommendation need not be given. Hopefully, the jury will consider the enumerated aggravating and mitigating circumstances, but the statute nowhere directs that the jury may not consider other factors.

In short, any capital defendant becomes a candidate for the death penalty or for life imprisonment with total discretion in the jurors and trial judge to determine whether any particular defendant shall be put to death. In the words of Mr. Justice White, concurring in *Furman*, the statute is one in which "the legislature does not itself mandate the penalty in any particular class or kind of case (that is, legislative will is not frustrated if the penalty is never imposed), but delegates to judges or juries the decisions as to those case, if any, in which the penalty will be utilized" *Id.*, 408 U.S. at 311. The Florida legislature "has not ordained that death shall be the automatic punishment for murder" rather, the legislature has preserved the "sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed" (emphasis added). *Id.*, 408 U.S. at 308, 310 (concurring opinion of Mr. Justice Stewart).

Finally, the 1972 Florida Capital Punishment Act purports to differ from its unconstitutional predecessor by virtue of the fact that it vests the ultimate decision whether a capital defendant will live or die with the trial judge rather than the jury.<sup>56</sup> To that assertion,

<sup>56</sup>This Court has already made clear that the principle of *Furman* applies to sentencing by judges as well as by juries. See, e.g., *Alvarez v. Nebraska*, 408 U.S. 937 (1972); *Miller v. Maryland*, 408 U.S. 934 (1972); *Steigler v. Delaware*, 408 U.S. 939 (1972).

the trial judge who originally declared the statute unconstitutional said:

This is a distinction without a difference. The evil condemned in *Furman* was discretion; hence the ruling in *Furman* is applicable here.<sup>57</sup>

The learned trial judge's observation is beyond challenge.

#### **B. APPELLATE REVIEW OF DEATH SENTENCES UNDER THE NEW FLORIDA STATUTE PROVIDES NO MEANINGFUL PROTECTION FROM ARBITRARY APPLICATION OF THE DEATH PENALTY.**

Petitioner's sentence of death under the new Florida statute was automatically reviewed by the Supreme Court of Florida. Fla. Stat. Ann. §921.141(4)(1975-1976 Supp.); Fla. Const., Art. V, §3(b)(1).<sup>58</sup> The Supreme Court of Florida has observed that this appellate review is intended to provide the last of several "concrete safe-guards beyond those of the trial system to protect [a defendant] . . . from death where a less harsh punishment might be sufficient." *State v. Dixon, supra*, 283 So.2d at 7.

"Again, the sole purpose of . . . [this appellate

<sup>57</sup>*State v. Dixon, et al.*, Case No. 73-100(a)(b)(c) (Eleventh Judicial Circuit Court in and For Dade County, Fla., decided March 9, 1973). Paul Baker, Circuit Judge.

<sup>58</sup>Under Florida's pre-*Furman* capital sentencing procedure, jurisdiction to review death sentences was vested, as a matter of right, in the Florida Supreme Court. Fla. Const., Art. V., §4(2)(1968).



review] is to provide the convicted defendant with one final hearing before death is imposed. Thus, it again presents evidence of legislative intent to extract the penalty of death for only the most aggravating, the most indefensible of crimes."

*Id.*, 283 So.2d at 8.

The *Dixon* majority was heedless of Mr. Justice Ervin's warning that: "Appellate review of the issue of punishment was provided for by several statutes which were found to be unconstitutional as a result of *Furman*." *Id.*, 283 So.2d at 18 (footnote omitted) (dissenting opinion). The principles of *Furman* were specifically applied by this Court in reversing death sentences in cases in which the state appellate courts had, pursuant to statute, reviewed and affirmed sentences upon the express ground that the facts and circumstances warranted the ultimate penalty.<sup>59</sup> This

<sup>59</sup>See, e.g., *Alford v. Eyman*, 408 U.S. 939 (1972), reversing Judge imposed death sentence upheld by the State Supreme Court in *State v. Alford*, 98 Ariz. 124, 402 P.2d 551, 557 (1965).

*Kruchten v. Eyman*, 408 U.S. 934 (1972), reversing Judge imposed death sentence upheld by the State Supreme Court in *State v. Kruchten*, 101 Ariz. 186, 417 P.2d 510 (1966). See ARIZ. REV. STAT. § 13-1717.

*Hurst v. Illinois*, 408 U.S. 935 (1972) reversing death sentence (imposed by jury and sustained by trial judge) upheld in *People v. Hurst*, 42 Ill. 2d 217, 247 N.E. 2d 614 (1969).

*Alvarez v. Nebraska*, 408 U.S. 937 (1972) reversing Judge imposed death sentence upheld in *State v. Alvarez*, 182 Neb. 358, 154 N.W.2d 746, 748 (1968): "We have been unable to find any mitigating circumstances for the murder in the facts establishing the murder itself." *Pope v. Nebraska*, 408 U.S. 933 (1972) reversing Judge imposed death sentence upheld in *State v.*

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court reversed these sentences even though these same state appellate courts had adopted a regular practice of reversing death sentences found to be unwarranted upon a consideration of aggravating and mitigating circumstances.<sup>60</sup>

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*Pope*, 186 Neb. 489, 184 N.W.2d 395 (1971). See NEB. REV. STAT. § 29-2308.

*Fesmire v. Oklahoma*, 408 U.S. 935 (1972), reversing Judge imposed death sentence upheld in *Fesmire v. State*, 456 P.2d 573, 586-587 (Okla. Ct. Cr. App. 1969): "It does not appear that the defendant's friend . . . performed any act or deed which might be considered in mitigating the punishment of his murder . . ." *Menthen v. Oklahoma*, 408 U.S. 940 (1972), reversing Judge imposed death sentence upheld in *Menthen v. State*, 492 P.2d 351 (Okla. Ct. Cr. App. 1971): "As to the defendant's contention that the punishment was excessive, the brutality with which the innocent child was mutilated and slain, as evidenced by the exhibits and record before us, leads us to the conclusion that the judgment and sentence entered by the trial court was proper, and not excessive."

*Phelan v. Brierly*, 408 U.S. 939 (1972), reversing Judge imposed death sentence upheld in *Commonwealth v. Phelan*, 427 Pa. 265, 234 A.2d 540 (1967).

<sup>60</sup>See, e.g., *State v. Maloney*, 105 Ariz. 348, 464 P.2d 793 (1970) (reversing death sentence on grounds that the mitigating circumstances of defendant's young age outweighed the atrocity of the crime); *State v. Valenzuela*, 93 Ariz. 189, 403 P.2d 286 (1965) (reversing death sentence because of disparity between sentence imposed upon codefendant).

*People v. Crews*, 42 Ill.2d 60, 244 N.E.2d 593 (1969) (reversing death sentence on grounds that defendant had no prior criminal record, was well regarded by friends and was acting under the influence of drugs); *People v. Walcher*, 42 Ill.2d 159, 246 N.E.2d 256 (1969) (reversing death sentence on grounds defendant was an alcoholic.)

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# 1. The absence of statutory or judicial standards of review permits unequal infliction of the death penalty

The new Florida capital punishment statute provides no guidelines for appellate review of death sentences.<sup>61</sup>

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*State v. Hall*, 176 Neb. 295, 125 N.W.2d 918 (1964) (reversing death sentence on grounds that defendant was young, feeble-minded and had no previous record); *Muzik v. State*, 99 Neb. 496, 156 N.E. 1056 (1916) (reversing death sentence on grounds that defendant although legally sane was mentally abnormal).

*Lewis v. State*, 451 P.2d 399 (Okla.Ct.Cr.App. 1969) (reversing death sentence on grounds that defendant's participation in felony murder was that of minor accomplice); *Williams v. State*, 205 P.2d 524 (Okla.Ct.Cr. App.1949) (reversing death sentence on grounds that defendant had limited education and was intoxicated at time of crime); *Waters v. State*, 197 P.2d 299 (Okla.Ct.Cr.App.1948) (reversing death sentence on ground that defendant did not have bad record and victim was engaged in illegal activity when killed).

*Commonwealth v. Green*, 396 Pa. 137, 151 A.2d 241 (1951) (reversing death sentence on grounds of youth of defendant and his low intelligence); *Commonwealth v. Irelan*, 241 Pa. 43, 17 A.2d 897 (1941) (reversing death sentence on grounds that defendant was a devoted mother, had good reputation, was in desperate financial situation, and was poorly educated); *Commonwealth v. Garramone*, 307 Pa. 507, 161 A.733 (1932) (reversing death sentence on grounds that defendant was of good character and without criminal record and that there was provocation present).

<sup>61</sup>Prior to the 1972 statute, the rule in Florida was that appellate courts lacked authority to reduce sentences on grounds of excessiveness, where the sentence fell within the limits defined by statute. *Brown v. State*, 152 Fla. 853, 13 So.2d 458, 461-62 (1943). In *Davis v. State*, 123 So.2d 703, 707 (Fla.1960), for

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No judicially devised standards of review have emerged from the nineteen cases in which the Florida Supreme Court has construed the statute.<sup>62</sup> While the Court has

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example, the Florida Supreme Court declined to reduce the death sentence of a defendant condemned for rape, ruling that "[i]n a long adhered to line of cases, we have held that where a sentence is within the statutory limit, the extent of it cannot be reviewed on appeal regardless of the existence or nonexistence of mitigating circumstances. . . . [The statute setting the penalty for rape] fixes the maximum penalty for the offense of the appellant at death, and since this is within the statutory limit, it is not reviewable." See also *De Loach v. State*, 232 So.2d 765, 766, (Fla.1970); *La Barbara v. State*, 63 So.2d 654,655 (Fla. 1953); *Le Prell v. State*, 124 So.2d 18,19 (Fla.App.1960). The post-*Furman* capital punishment statute does not explicitly authorize the Florida Supreme Court to review the exercise of trial judge's sentencing discretion, but the Florida Supreme Court has exercised both procedural, see *Taylor v. State*, 294 So.2d 648,651 (Fla.1974) ("[f]rom our reading of the record it appears that the trial judge in his haste to impose sentence may not have properly considered the mitigating circumstances enumerated by the statute and found in the record"), and substantive, see *Tedder v. State*, 322 So.2d 908 (Fla. 1975); *Halliwell v. State*, 323 So.2d 557 (Fla. 1975), review of death sentence imposed under the 1972 legislation.

<sup>62</sup>*Darden v. State*, Fla.Sup.Ct., No. 45-056 (Feb.18, 1976); *Douglas v. State*, Fla.Sup.Ct., No. 44,864 (Feb.18,1976); *Thompson v. State*, Fla.Sup.Ct., No. 45,107 (Jan.21, 1976); *Dobbert v. State*, Fla.Sup.Ct., No. 45,558 (Jan.14,1976); *Halliwell v. State*, 323 So.2d 557 (Fla.1975); *Tedder v. State*, 322 So.2d 908 (Fla.1975); *Alvord v. State*, 322 So.2d 533 (Fla.1975); *Songer v. State*, 322 So.2d 481 (Fla.1975); *Swan v. State*, 322 So.2d 485 (Fla. 1975); *Slater v. State*, 316 So.2d 539 (Fla.1975); *Proffitt v. State*, 315 So.2d 461 (Fla.1974); *Sawyer*, 313 So.2d 680 (Fla.1975); *Gardner v. State*, 313 So.2d 675 (Fla.1975); *Spinkellink v. State*, 313 So.2d 666 (Fla.1974); *Alford v. State*,

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thus far affirmed twelve death sentences and reversed seven death sentences,<sup>63</sup> none of its written opinions offers the slightest explanation of why "a less harsh penalty [is not] . . . sufficient," *State v. Dixon, supra*, 283 So.2d at 7, or the least explanation of any other reasoned grounds or principles for deciding why one capital defendant is saved while another must die. The Florida Justices have merely recognized their responsibility for appellate review of death sentences, and implicitly, that their review adds yet another level of discretion to the procedure. Indeed, in *State v. Alvord*, 322 So.2d 533, 540 (Fla.1975), the Court expressed the nature of its review: "It is our responsibility to review the sentence in the light of the facts presented in the evidence, as well as other decisions, and determine whether or not the punishment is too great."<sup>64</sup> In *Songer v. State*, 322 So.2d 481, 484

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307 So.2d 433 (Fla.1975); *Hallman v. State*, 305 So.2d 180 (Fla.1974); *Sullivan v. State*, 303 So.2d 632 (Fla.1974); *Lamadline v. State*, 303 So.2d 17 (Fla.1974); *Taylor v. State*, 294 So.2d 648 (Fla.1974). See also, *State v. Dixon*, 283 So.2d 1 (Fla.1973) (Pre-trial certification).

<sup>63</sup>The Court affirmed the death sentences imposed upon appellants Darden, Douglas, Dobbert, Alvord, Songer, Proffitt, Sawyer, Gardner, Spinkellink, Alford, Hallman, and Sullivan. The Court reversed death sentences imposed upon appellants Thompson, Halliwell, Tedder, Swan, Slater, La Madline, and Taylor.

<sup>64</sup>Mr. Justice England has referred to the Florida capital procedure as "trifurcated": "The sentence procedures set out in the act are usually described as 'bifurcated'. In reality, however, the statute creates three tiers in the sentencing process—the jury, the judge, and this Court." *Alvord v. State*, 322 So.2d 533, 542 n.10 (Fla.1975) (dissenting opinion).

(Fla.1975) (footnote omitted) the Court emphasized that "[w]hen the death penalty has been imposed, this Court has a separate responsibility to determine independently whether the imposition of the ultimate penalty is warranted."

2. The Florida procedure limiting appellate review only to death sentences fails to provide means for the court to determine if death is being uniformly and non-arbitrarily applied.

The development of an accurate, reliable and rational standard for review of sentences imposed in comparable cases under similar factual circumstances is impossible under the new Florida death penalty statute.<sup>65</sup> Under the new statute, there is no appellate review by the Florida Supreme Court when a sentence of life imprisonment, rather than the death penalty, is imposed by the trial judge in a capital case; such cases are not appealable by right to the Florida Supreme Court. See Fla. Const. Art. V §3(b)(1). Moreover, no reasons need be assigned by a judge to explain a life sentence. Even if a lesser sentence for first degree murder or some lesser homicide offense is arbitrary, atypical, or

<sup>65</sup>The Florida Supreme Court opined in *State v. Dixon, supra*, 283 So.2d at 10: "Review by this Court guarantees that the reasons [for imposing the death sentence] present in one case will reach a similar result to that reached under similar circumstances in another case." However, Mr. Justice England has pointed out that "The statute defies uniformity at the outset by limiting our review to only the capital cases where the judge imposes death." *Alvord v. State*, 322 So.2d 533, 542 n.11 (Fla.1975) (dissenting opinion). "Since we do not have jurisdiction to review capital cases resulting in a sentence of life

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discriminatory, it cannot be modified on appeal since neither the Florida Supreme Court nor the Courts of Appeal are authorized to impose a death sentence or to vacate a life sentence and remand for resentencing in the event a life sentence is irrationally or arbitrarily imposed. See note 61, *supra*. Consequently, another "infirmity in Florida's appellate review provision is that review by the supreme court cannot protect against arbitrary mitigation of the death penalty at the trial court level. . . . [E]ven if all those executed are found by the supreme court to be guilty of the most 'aggravated' and 'indefensible' crimes, some of those spared at the trial court level may also be guilty of that same quality of criminal activity."<sup>66</sup> Overlooking the question whether appellate review of any sort could save unregulated and arbitrary trial court death-sentencing decisions from condemnation under *Furman*,<sup>67</sup> it is manifest that the sort of review

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imprisonment (absent some other basis for our jurisdiction), we have no idea how many persons convicted of capital crimes have avoided a judge's sentence of death. Nor do we know what the juries recommended in those cases." *Id.* at 542 n.2.

<sup>66</sup>Note, *Florida's Legislative and Judicial Responses to Furman v. Georgia: An Analysis and Criticism*, 2 FLA.ST.L.REV. 108,147 (1974) (footnotes omitted).

<sup>67</sup>If the trial procedures afforded by the Florida capital punishment statute are arbitrary in violation of the Eighth Amendment rights of capital defendants, it is questionable whether any appellate procedures can rectify the error. "The law itself must save the parties' rights, and not leave them to the discretion of the court as such." *Louisville & Nashville Ry. Co. v. Central Stock Yards Co.*, 212 U.S. 132,144 (1909). Five years later, Justice Holmes cited this quotation from the *Central Stock*

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provided by and practice under the present Florida Statute is wholly ineffective for that purpose.

**3. The Florida proceeding defies uniformity at the outset by limiting Supreme Court review only to capital cases resulting in death sentences.**

The factual circumstances which gave rise to the death sentence in Petitioner's case are not dissimilar to those present in other cases which resulted in the imposition of life sentences. For instance, Michael Powers was convicted of Murder in the First Degree and Robbery of a 50 year old store owner. The jury recommended and the Court sentenced Powers to life imprisonment. The evidence indicated that Powers stated before entering the victim's store that it was his intent to kill the proprietor. Upon entering the store he forced the proprietor to the rear of the building, directed him to sit on a box and then fired three shots into the victim's head, killing him instantly. While in jail, Powers made numerous statements that he intended to and was glad he shot the old man. (See - Appendix A at A-27)

Another life sentence was imposed for First Degree Murder where the victim, a taxi cab driver, was shot in the head by the defendant Jolly during a robbery. While the State contended that the murder was especially heinous, atrocious and cruel, the jury recommended and the Court sentenced the defendant to life. (See-Appendix A at A-43)

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*Yards* case and concluded: "[t]he point there was that a defect in a law could not be cured by precautions in a judgment." *International Harvester v. Kentucky*, 234 U.S. 216,220 (1914).



The Defendant Zadnick received two life sentences imposed by the Court where the jury recommended death for the beating and stabbing deaths of the Defendant's girl friend and her 5 year old son. The trial Judge, in overruling the jury's death recommendation, observed that the crime was not particularly heinous, atrocious and cruel. (See-Appendix A at A-22)

The Circuit Court in Hillsborough County (the same court which sentenced the Petitioner) imposed two concurrent life sentences upon Defendant McMahon upon his plea of guilty to two First Degree Murders for the killing of two young girls, ages 5 and 13. The evidence indicated that the Defendant drove his vehicle to the opposite side of the street and off the roadway running over the two girls and their brother. The Defendant immediately stopped the car and threw the older girl into the car and sped away. Two days later the 13 year old was discovered with her panties off but no evidence of sexual molestation. McMahon turned himself in to law enforcement officer ten days after the crime. (See-Appendix A at A-32)

Defendant Gould stabbed an elderly woman when she allegedly caught him shoplifting, and after the murder he took money from the cash register. It appeared that Gould had a bad record with convictions of other significant crimes but was allowed to enter a negotiated plea to murder in the first degree and to other crimes in exchange for a plea for life sentence. (See-Appendix A at A-85)

In another Hillsborough County case, Defendant Tillman along with Defendant Witt abducted an 11 year old boy, took him to an orange grove, sexually molested him, beat him repeatedly with a heavy metal star drill, cut over his stomach in "field dress" style, dismembered his body and buried him in a shallow grave. The co-defendant cut off the boy's penis and

placed it in a glass bottle and took the bottle home. Tillman pled guilty to First Degree Murder in exchange for a life sentence. His accomplice, Witt, was convicted by a jury and received the death penalty. (See-Appendix A at A-58)

Defendant Elley and two other men kidnapped an elderly woman, forced her into Defendant's car, drove to an isolated area, robbed her of her jewelry and money, strangled and beat her to death. He received a life sentence in exchange for a plea of guilty. (See-Appendix A at 4-42)

Peoples stationed himself at a second story window across the street from his girl friend's house where she sat on the porch with the victim. Peoples shot the victim in the head. The state stipulated that there were no aggravating circumstances warranting the imposition of the death penalty. The jury recommended death. However, a life sentence was imposed by the same judge who sentenced Petitioner to death. (See-Appendix A at A-65)

Because the circumstances which exist in capital cases may, and more often do, result in life sentences which are not reviewed by the Florida Supreme Court, the Court cannot begin to fulfill its commitment to guarantee "that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case." *State v. Dixon, supra*, 283 So.2d at 10.

4. The decisions of the Florida Supreme Court do not reveal any rational distinction between the death sentences which have been reversed and those which have been affirmed.

Examination of the sentencing decisions of the Florida Supreme Court shows that the Court has reached different decisions in cases which are factually similar and that it has reversed death sentences in cases that involve more aggravated factual circumstances than in cases where it has affirmed death sentences.

The Court affirmed a death sentence in *Gardner v. State*, 313 So.2d 675 (Fla.1975), where appellant, in a drunken stupor, had brutally beaten his wife to death. The evidence revealed that appellant had been drinking heavily for the twenty-four hours before the killing, that he had fallen asleep with his wife's dead body, that he had sought help for her the next morning, "because his wife did not appear to be breathing properly," 313 So.2d at 679, that he made no attempt to escape, and that he exhibited remorse upon learning that his wife was dead. See 313 So.2d at 678-679. The jury recommended mercy, but the Court affirmed the trial court's imposition of a death sentence. In dissent, Mr. Justice Ervin declared, "I do not believe that the statutes contemplate that a crime of this nature is intended to be included in the heinous category warranting the death penalty. A drunken spree in which one of the spouses in killed traditionally has not resulted in the death penalty in this state."<sup>68</sup> ... [T]his

<sup>68</sup>Mr. Justice Ervin's perception is clearly correct, and the *Gardner* sentencing jury appears to have reflected community sentiment in its advisory verdict. The appellate reports for the year 1975 reveal a number of second degree murder convictions (*Lattimore v. Florida*, 323 So.2d 5 (Fla.App.1975); *Beasley v. State*, 315 So.2d 540 (Fla.App.1975); *Smith v. State*, 314 So.2d 226 (Fla.App.1975); *Calvo v. State*, 313 So.2d 39 (Fla.App.1975); *McCrae v. State*, 313 So.2d 429 (Fla.App.1975);

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cause involv[es] a crime of passion in a drunken 'spree.'" 313 So.2d at 679.

There is no way to meaningfully distinguish *Taylor v. State*, *supra*, from *Sawyer v. State*, 313 So.2d 680 (Fla.1955). In both cases, the defendants were convicted of slaying liquor store clerks during the course of an armed robbery. In both cases, more than one armed robber participated in the crime,<sup>69</sup> and there was evident resistance by the store personnel. In neither case was it established that the defendant intentionally shot the victim.<sup>70</sup> In both cases, the

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*Noel v. State*, 311 So.2d 182 (Fla.App.1975); *Melero v. State*, 306 So.2d 603 (Fla.App. 1975)) and manslaughter convictions (*Hanna v. State*, 319 So.2d 586 (Fla. App.1975); *Robbins v. State*, 312 So.2d 243 (Fla.App.1975)) where defendants have slain their spouse or lover, with varying degrees of aggravation, but *Gardner* is the only case in which a death penalty was imposed for such a homicide.

<sup>69</sup>*Sawyer*, one Lester, and one Dixon, (in whose pre-trial appeal, with *Sawyer's*, the Florida Supreme Court first upheld the constitutionality of the Florida death penalty statute, *State v. Dixon*, 283 So.2d 1 (Fla.1973)) were charged with the same felony murder arising out of the liquor store robbery for which a death penalty was imposed in *State v. Sawyer*. Both Dixon and Lester were acquitted. See *State v. Dixon*, Cir.Ct., 13th Jud. Cir. (Dade Co.), No. 73-1001(a), (Jan.11,1974), and *State v. Lester*, Cir. Ct., 13th Jud.Cir., (Dade Co.), No. 73-1001(b), (Nov.6, 1975).

<sup>70</sup>In *Taylor*, the evidence clearly suggested that the defendant did not fire the fatal shot. *Taylor v. State*, *supra*, 294 So.2d at 652. In *Sawyer*, the fatal shot was fired from appellant's gun during a struggle with someone who was *not* the victim of the shooting. *Sawyer v. State*, *supra*, 313 So.2d at 680. Under the

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sentencing juries unanimously recommended life imprisonment, and the trial court imposed the death penalty. Yet in *Taylor*, the Florida Supreme Court reversed the death penalty, and in *Sawyer*, it affirmed the trial court's sentence (on the basis of "aggravating circumstances" not specified in the Florida capital punishment statute).

In *Halliwell v. State*, 323 So.2d 557 (Fla.1975) the Court reversed a death sentence (in a case where the jury had recommended death) imposed upon a defendant who had been convicted of murdering his paramour's husband. Defendant had beaten the victim to death with an iron bar and had then hacked the body into several pieces. The gruesome details of the slaying are recounted in the Florida Supreme Court's opinion:

On January 17, 1974, the dismembered body of Arnold Tresch was found in Cypress Creek. . . The upper torso was in a garbage can. . . The lower torso and the amputated legs were found nearby in Appellant's footlocker. . . After killing Tresch on the morning of January 9, 1974, Appellant confessed that he stored the body until he could find time to dismember it, conceal the pieces and remove them to Cypress Creek the following day. . . [H]is shop was searched with his written permission, the detective finding blood on the floor as well as bloody human flesh on a saw, a machete and a bloody breaker bar which the

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established doctrine of felony-murder, of course, no finding of intent or premeditation is necessary to justify a conviction for first degree murder, and one felon may be held vicariously liable for an unintentional killing by a co-felon during the course of the felony.

Appellant said later was the death weapon. . . Appellant. . . confessed. . . that he had beaten him [Tresch] to death, unable to stop the fatal blows once he began. . . Appellant [had] grabbed a 19-inch breaker bar and beat the husband's skull with lethal blows and then continued beating, bruising and cutting the husband's body with the metal bar after the first fatal injuries to the brain."

323 So.2d at 559, 561. The Florida Supreme Court reversed the death penalty which had been recommended by the jury and imposed by the trial judge, ruling that "a finding of premeditated murder [was justified], but we see nothing more shocking in the actual killing than in a majority of murder cases reviewed by this Court." 323 So.2d at 561.<sup>71</sup> Inexplicably, however, the Court affirmed a death sentence in *Spinkellink v. State*, 313 So.2d 666 (Fla. 1975) in which the murder had also been found to be "especially heinous, atrocious, or cruel" by the trial court, in a case where there had been considerable provocation for the killing (the defendant Spinkellink had been homosexually assaulted, robbed and forced to play Russian Roulette by the deceased).

Without the articulation of any legislative standards, the enunciation of a reasoned opinion on capital

<sup>71</sup>As in *Taylor v. State*, *supra*, the Court speculated as to the reasons for the jury's advisory verdict of death: "We cannot read the minds of jurors, but it is reasonable to suspect that the hideous and gruesome conduct of the Appellant in dismembering the body several hours after the murder probably was considered by the jury in recommending the death penalty." *Halliwell v. State*, *supra*, 323 So.2d at 561. Again, there is simply no way to fathom the reasons for the jury's recommendations, and the Florida Supreme Court offers scant explanation for the result of its review of the sentence.

sentencing, a discussion of the factual circumstances justifying or failing to justify the sentence in a particular case, and an analysis of sentences imposed in comparable cases, it is impossible to ascertain whether or not the imposition and affirmance of a death sentence in a particular case is arbitrary and whether death is indeed being inflicted "for only the most aggravated, the most indefensible of crimes." *State v. Dixon, supra*, 283 So.2d at 7.<sup>72</sup>

<sup>72</sup>The other flaws in the Florida Statute, previously discussed, make impossible the provision of any meaningful appellate review, of course. This is evident in, for example, *Taylor v. State*, 294 So.2d 648 (Fla.1974), where the Florida Supreme Court reversed a death sentence in a case where the advisory jury had recommended mercy but the trial court condemned the defendant. No additional evidence had been offered in aggravation or mitigation at the sentencing hearing. 294 So.2d at 651. The Court relied on the advisory jury verdict (which it could not possibly explicate, since it consisted simply of a recommendation of mercy, with no analysis of mitigating circumstances which the jury found) in its decision and it enumerated certain mitigating circumstances (some of them non-statutory) which *might* have been found on the basis of the evidence introduced, 294 So.2d at 652. It concluded: "From our reading of the record it appears that the trial judge in his haste to impose sentence may not have properly considered the mitigating circumstances enumerated by the statute and found in the record . . . All of this [the mitigating circumstances which might possibly have been found] taken together could have *substantially impaired* the rationality of appellant to the point where the jury, believing his complicity, nevertheless rejected the idea of the imposition of the ultimate penalty." 294 So.2d at 651-652 (emphasis in original). Of course the Court necessarily had to speculate as to the nature of the jury's advisory decision: the jury could have found a number of aggravating circumstances, but determined that death was not warranted: it could

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# 5. Affirmance of petitioner's death sentence by the Florida Supreme Court illustrates the arbitrary application of the death penalty.

In Petitioner's state appeal, the Florida Supreme Court did not review the "case in light of other decision and determine whether the punishment is too great." *State v. Dixon, supra*, 283 So.2d at 10. Rather, the Court's review of the Petitioner's death sentence consisted of a mere recitation of the judge's written findings as to aggravating and mitigating circumstances and a shallow holding that "[w]e must obviously conclude that no error was committed." *Proffitt v. State, supra*, 315 So.2d at 466-467. Close comparison of this case with other Florida death cases reveals an utter failure of meaningful review of the reasons that Petitioner has been selected to die.

For example, the Florida Supreme Court concurred with the judge's finding in aggravation that "the murder of . . . [the victim by the Petitioner] was especially heinous, atrocious and cruel." *Id.*, 315 So.2d at 466. However, Medgebow's death resulted from a single stab wound. (R216, 119) The circumstances of this case fall far short of the Florida Supreme Court's initial construction of the meaning of an "especially heinous, atrocious or cruel" capital felony:

It is our interpretation that heinous means

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have voted to spare defendant on the basis of non-statutory mitigating circumstances—because he was personally sympathetic, because he was afflicted with a drug habit, because accomplices also participated in the crime, or because the killing was unintentional.



extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

*State v. Dixon, supra*, 283 So.2d at 9. Indeed, in *Swann v. State, supra*, the Court vacated a death sentence imposed upon a burglar who, with a confederate, administered a fatally “severe beating,” 322 So.2d at 486, and “torture,” 322 So.2d at 487, to a forty-nine year old female housekeeper, even though the trial court had found that the crime was “outrageously wicked, vile, atrocious, cruel and heinous.” 322 So.2d at 489. In *Halliwell v. State, supra*, where the jury recommended death and the trial court found the fatal beating and dismemberment of the victim to have been committed “in an extremely heinous, atrocious and cruel manner,” 323 So.2d 561, the Florida Supreme Court reasoned that the actual killing was no more shocking than the majority of murder cases reviewed and concluded “that the death penalty is not warranted.” *Id.* If the brutal slayings in *Swan* and *Halliwell* were not “expecially heinous, atrocious and cruel” murders, then the death of Mr. Medgebow from a single stab wound cannot be, and the facts here do not “set the crime apart

“That the capital felony for which...[the Petitioner] was convicted was not committed while the

[Petitioner] was under the influence of extreme mental or emotional disturbance.

That at the time of the commission of the offense the [Petitioner's] capacity to appreciate the criminality to [sic] the requirements of law was not substantially impaired.”

*Proffitt v. State, supra*, 315 So.2d at 466-467. At the sentencing proceeding, a psychiatrist who had examined the Petitioner testified that he was “certain that [Petitioner] was under an intense amount of uncontrollable emotional stress” (R503) at the time of the offense.

Q. Doctor, do you have an opinion as to whether or not the defendant could conform his conduct to the requirements of law, at the time he committed the offense or whether his ability to do that was substantially impaired?

A. I'm certain that at the moment and at the time that this occurred this individual was overwhelmed with the force over which he had no control and to which he must carry out the deed.

Q. So that he was unable to conform his conduct to the requirements of law?

A. That is correct. (R504, 505).

Nonetheless, the Florida Supreme Court approved the judge's findings that the quoted mitigating circumstances were not shown to exist. Yet in *Halliwell v. State, supra*, the Court reversed a death sentence recommended by the jury and imposed by the trial judge where the police officer (not a psychiatrist) testified that Halliwell was “under emotional strain over the mistreatment of Sandra [the decedent's wife] by the victim and that Appellant was greatly influenced by

her." 323 So.2d at 557. Thus, even though there was competent, expert testimony that Petitioner was under the influence of "an intense amount of uncontrollable emotional stress" (R503) to the extent that his ability to conform his conduct to the requirements of law was substantially impaired (R504), he is condemned to die while Mr. Halliwell has been spared.

Finally, the Florida Supreme Court affirmed the trial court's finding in aggravation:

"That the [Petitioner] knowingly through his voluntary and intentional acts leading up to and during the course of the commission of the offense for which he was convicted created a great risk to [sic] serious bodily harm and death to many persons.

*Proffitt v. State, supra*, 315 So.2d at 466. Joel Medgebow's killer struck Mrs. Medgebow, who did not herself sustain "serious bodily harm"<sup>73</sup> or death, although she was bruised. (R280) How can it be said, beyond a reasonable doubt, that the assailant knowingly created a great risk of serious bodily harm and death to many persons when the only other person with whom he came into contact escaped relatively unscratched? Indeed, a lone man, inflicting a single stab wound to only one person simply does *not* constitute "a great risk of death to many persons."<sup>74</sup> A true risk of death

<sup>73</sup>The statute does not list great risk of "serious bodily harm" to many persons as an aggravating circumstance. See Stat. Ann. §921.141(5)(c) (1975-1976 Supp.).

<sup>74</sup>Hearings in the Florida Legislature preceding passage of the present death penalty statute indicate that this aggravating circumstance (§921.141(5)(c)) was directed at wanton acts  
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to many persons existed in *Tedder v. State, supra*, where the appellant fired a shot at his wife, infant son and mother-in-law during a marital dispute and then fatally wounded his mother-in-law. In imposing the death sentence the trial court found in aggravation that Tedder had "knowingly created a great risk of death to many persons." 322 So.2d at 910. The Florida Supreme Court reversed the death sentence, agreeing with Tedder that a life sentence should have been imposed. The Court knew that Tedder had knowingly endangered the lives of two persons other than the victim, and that there was no evidence that Petitioner even threatened Mrs. Medgebow with a knife. Yet, the Court reversed Tedder's death sentence and condemned the Petitioner to die.

Thus, there appears no rational explanation as to why the Petitioner must suffer the death penalty while convicted murderers Swan, Halliwell and Tedder were spared after the discretionary review by the Florida Supreme Court. The reasoning and standards the Court applies to factually similar cases remain baffling and arbitrary.

The Florida Supreme Court has candidly recognized that the 1972 death penalty statute has not regularized the imposition of capital punishment to guarantee that those condemned are not simply "a capriciously selected random handful upon whom the sentence of death has in fact been imposed," *Furman v. Georgia*,

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endangering the public such as hijacking an airplane, shooting into a crowd, or bombing a public place. See Hearings Select Committee on the Death Penalty, Florida House of Representatives, at 66 (Aug. 4, 1972).



408 U.S. 238, 309-310 (1972) (concurring opinion of Mr. Justice Stewart) (footnote omitted):

"There is no way that the Legislature could program a judicial computer with all of the possible aggravating factors and all of the possible mitigating factors in each case. See *State v. Dixon*, *supra*. The law does not require that capital punishment be imposed in every conviction in which a particular state of facts occur. The statute properly allows some discretion, but requires that this discretion be reasonable and controlled. No defendant can be sentenced to capital punishment unless the aggravating factors outweigh the mitigating factors. However, this does not mean that in every instance under a set state of facts the defendant must suffer capital punishment . . . Certain factual situations may warrant the infliction of capital punishment, but nevertheless, would not prevent either the trial jury, the trial judge, or this Court from exercising reasoned judgment in reducing the sentence to life imprisonment. Such an exercise of mercy on behalf of the defendant in one case does not prevent the imposition of death by capital punishment in the other case."

*Alvord v. State*, 322 So.2d 533, 540 (Fla. 1975). The Florida procedure is thus utterly unfitted to "reserve [the] . . . application [of capital punishment] to only the most aggravated and unmitigated of [the] most serious crimes" *State v. Dixon*, *supra*, 283 So.2d at 7. The "concrete safeguards", *Id.*, of the new Florida law are illusory. The Florida Supreme Court's independent review of death sentences, see *Songer v. State*, *supra*, 322 So.2d at 484, merely injects yet a third level of human discretion into the capital sentencing process.<sup>75</sup>

<sup>75</sup>See *Alvord v. State*, *supra*, 322 So.2d at 542 (dissenting opinion of Mr. Justice England).

Thus, appellate review by the Florida Supreme Court provides "no meaningful basis for distinguishing the few cases in which [the death penalty] . . . is imposed from the many cases in which it is not." *Furman v. Georgia*, *supra*, 408 U.S. at 313 (concurring opinion of Mr. Justice White).

### C. PRE-SENTENCE AND POST-SELECTIVE MECHANISMS PERPETRATE THE ARBITRARY INFLICTION OF THE DEATH PENALTY.

#### 1. Prosecutorial Discretion

In Florida, the State Attorney is elected at the general election and serves for a term of four years.<sup>76</sup> As State Attorney, it is his duty to "appear in the Circuit and County Courts within his judicial circuit and prosecute or defend on behalf of the State all suits, applications, or motions, civil or criminal, in which the State is a party."<sup>77</sup> Little guidance is provided by the statutes or the rules as to how he is to accomplish these

<sup>76</sup>Fla. Stat. Ann., §27.01 (1973). A candidate for that office must have been a member of the Florida Bar for the preceding five years and must be a resident of the territorial jurisdiction of the circuit. Fla. Const., Art. V, Sec. 17 (1868). See *Austin v. State*, *ex rel Christian*, 310 So.2d 289 (Fla. 1975). No special qualifications in the area of criminal law are required. There are twenty judicial circuits in Florida and therefore, twenty different State Attorneys. Fla. Stat. Ann., §26.01, 27.01 (1973).

<sup>77</sup>Fla. Stat. Ann., §27.02 (1973).

duties.<sup>78</sup> It is clear however that he has unfettered and virtually unreviewable discretion to initiate and terminate criminal prosecutions.<sup>79</sup> The State Attorney:

"[h]as been loosely referred to many times as a 'one-man grand jury'. And he is truly that. He is the investigatory and accusatory arm of our judicial system of government, subject only to the limitations imposed by the Constitution, the common law, and the statutes, for the protection of individual rights and to safeguard against the possible abuses of the far-reaching powers so confided."

*Imperato v. Spicola*, 238 So.2d 503, 506 (Fla. App. 1970).

"[w]ithin the limits of the constitution and applicable statutes all steps in the prosecution of persons suspected of crime are under . . . (the State Attorney's) supervision and control."

<sup>78</sup>Cf. Fla. R. Crim. Proc. 3.115: "The State Attorney shall provide the personnel or procedure for criminal intake in the judicial system." No further guidelines are established.

<sup>79</sup>The statutes defining the powers of the State's Attorney are to be "liberally construed." *Barnes v. State*, 58 So.2d 157, 159 (Fla. 1952).

"[T]he constitution and statutes impose a duty upon the State Attorney to prosecute in the Circuit Court information or upon indictment by the grand jury. If any indictment has not been found or any information filed for such an offense, then all indictable offenses triable within the county should be presented to the grand jury by the State Attorney."

*Austin v. State ex rel Christian*, 310 So.2d 289 (Fla. 1975); *State vs. Mitchell*, 188 So.2d 684, 687 (Fla. App.), cert. discharged, 192 So.2d 281 (Fla. 1966). See also *Smith v. State*, 95 So.2d 525, 527 (Fla. 1957). cf. *Newton v. State*, 178 So.2d 341, 344 (Fla. 1965).

*Collier v. Baker*, 155 Fla. 425, 20 So.2d 652, 653 (1945).

With the exception of the arresting officer, the initial determination that a particular homicide or rape is a capital offense is made by the State Attorney. He may file a direct information for less than a capital offense, or if he decides that no offense has been committed or can be proved, he may terminate the prosecution by entering a "No Bill." If he determines that no capital offense has been committed, the life of the perpetrator has, for all practical purposes, been spared.<sup>80</sup> If the State Attorney decides that a capital offense has been committed then, and only then, must the issue be presented to the grand jury to seek an indictment. The Florida legislature could, pursuant to its authority to prescribe the "powers and duties"<sup>81</sup> of the State Attorney, enact guidelines to specify when a capital indictment should be sought. To date however, neither the legislature nor the judiciary has attempted to provide the State Attorney with any guidelines or

<sup>80</sup>The grand jury to consider "offenses triable within the county that are presented to it by the State Attorney or his designated assistant or otherwise come to its knowledge". Fla. Stat. Ann., §905.16 (1973). (emphasis added). Theoretically, the grand jury may return a capital indictment for an offense which the State Attorney has already decided is not capital and which he did not present to them for their consideration. See *Johnson v. State*, 314 So. 2d 573 (Fla. 1975).

<sup>81</sup>*Owens v. State*, 61 So.2d 412, 414 (Fla. 1952); See also *Johns v. State*, 144 Fla. 256, 197 So. 791, 796 (1940).

<sup>82</sup>Discretionary prosecution in Florida is even greater in cases

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criteria which he may use in his decision whether a capital charge will be sought and prosecuted.<sup>82</sup>

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prosecutor nor grand jury are provided with guidelines to aid in determining which child should be indicted and which should be dealt with as a delinquent. And while it is true that in Florida involving juveniles, Fla. Stat. Ann. §39.05(5)(c) provides that the Juvenile Court is automatically divested of jurisdiction over "a child of any age" upon grand jury indictment of the child for a capital or life felony. This is in contravention of the constitutional requirement that the child must be given a hearing before the critical decision can be made whether the Juvenile Court shall waive jurisdiction over the child and the child treated in all respects as if he were an adult. This hearing must be before an impartial judge and the child afforded the full panoply of constitutional protection. *Kent v. United States*, 383 U.S. 541, 16 L.Ed.2d 84, 86 S.Ct. 1045 (1966); *In Re Gault*, 387 U.S. 1, 18 L.Ed.2d 527, 87 S.Ct. 1428 (1967); *State v. Steinhaver*, 216 So.2d 214 (Fla. 1968), conformed to 217 So.2d 590, U.S. cert. den. 398 U.S. 914; *Davis v. State*, 297 So.2d 289 (Fla. 1974). This requirement of a hearing has been implemented by Fla. Stat. Ann. §39.02(5)(a) and rules 8.100(b) and 8.110(b), Florida Rules of Juvenile Procedure. Fla. Stat. Ann. §39.02(2) provides that these hearings shall determine whether there is probable cause to believe the juvenile committed the offense charged and whether there are "reasonable prospects of rehabilitating the child to his majority." Guidelines are provided in Section 2(c) of the statute. Yet under 39.02(5)(c) the prosecutor can by-pass the hearing requirement of *Kent* and *Gault*, *supra*, in cases of capital or life felonies by the simple expedient of securing an indictment. He has unbridled discretion over which capital or life felony to present to the grand jury and hence which juvenile to treat as an adult and which is to be charged as a delinquent. This decision is fundamentally different from other prosecutorial decisions in that a normal charging decision is only the beginning of the process of adjudication of a defendant's guilt, a process marked by the presence of all the traditional protections of procedural due process. In contrast, the waiver decision marks not only the beginning, but also the end of adjudication as to the child's suitability for juvenile treatment. Further, neither

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He may "without violating [his] trust or any statutory policy . . . refuse to [seek] the death penalty no matter what the circumstances or the crime."<sup>83</sup> For "the legislative will is not frustrated if the penalty is never imposed."<sup>84</sup> The State Attorney's power to seek or to forego capital indictments remain complete discretionary:

"w here . . . a State Attorney's duty and authority require the examination of evidence in the determination of law and fact before taking action thereon, his duty and authority is ordinarily not strictly ministerial, but may even be quasi-judicial or discretionary in its character."

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the grand jury has theoretical power to go beyond cases presented to it by the prosecutor and initiate its own investigations and hand down indictments for the triable offenses the Supreme Court of Florida has treated equally as exercises of the prosecutor's discretion, the decision of whether to charge by indictment or information. See *Mitchell v. State*, 25 So.2d 73 (Fla. 1946). Thus, three seventeen year old children accused of a capital offense might be prosecuted in three totally different ways: the first child could be tried in a delinquency proceeding in juvenile court for a non-capital crime; the second child after hearing, could be "waived" to the adult court and tried for a non-capital crime; the third child could be indicted and tried for a capital offense. The choice is left entirely to the State Attorney and the possibilities for equal protection violations are limitless. Clearly, in Florida juvenile cases, the prosecutor has been given discretion of sufficient breadth to abrogate the mandate of the constitution of the United States. Nevertheless, this procedure has been held constitutional by the Supreme Court of Florida. *Johnson v. State*, 314 S.2d 573 (Fla. 1975)

<sup>83</sup>*Furman v. Georgia*, *supra*, 408 U.S. at 314 (concurring opinion of Mr. Justice White).

<sup>84</sup>*Id.* at 309 (concurring opinion of Mr. Justice Stewart), at 311 (concurring opinion of Mr. Justice White).

*Hall v. State*, 136 Fla. 644, 187 So. 392, 298 (1939).<sup>85</sup>

The only crimes which a State Attorney may not charge by direct information are capital crimes. These must be charged by an indictment returned by a grand jury.<sup>86</sup> Any grand jury, of course, has absolute discretion to indict or to refuse to indict regardless of the evidence presented to it.

Even if the grand jury returns a capital indictment, there is no guarantee that the charge will ever be considered by a petit jury. The State Attorney can terminate a criminal action whenever he determines "that the prosecution is not justified"<sup>87</sup> simply by entering a *nolle prosequi* in the appropriate court any time prior to the jury being sworn.<sup>88</sup> Permission of the trial court to take a *nolle prosequi* is not required.<sup>89</sup>

After having taken a *nolle prosequi*, the State Attorney is not precluded from later refiling another information or obtaining another indictment charging

<sup>85</sup>*Cf. Carlile v. State*, 129 Fla. 860, 176 So. 862, 863 (1937): "The State Attorney has very broad discretion in examining witnesses . . . prior to indictment." *Morgan v. State*, 309 So.2d 552 (Fla. App. 1975) held that the State Attorney does not have to "have a particular criminal statute in mind before he can interrogate a witness . . . he may be only suspicious that criminal activity has taken place."

<sup>86</sup>Fla. Const., Art. I, Sec. 15 (1968); Fla. R.Crim. Proc. 3.140(1).

<sup>87</sup>*Barnes v. State*, 58 So.2d 157, 159 (Fla. 1952). See also *Wilson v. Renfree*, 91 So.2d 857, 855-860 (Fla. 1952).

<sup>88</sup>*State v. Sakal*, 208 So.2d 156 (Fla.App. 1968).

<sup>89</sup>*State v. Wells*, 277 So.2d 544 (Fla.App. 1973); *State v. Fattorusso*, 228 So.2d 630 (Fla.App. 1969), *Wilk v. State*, 217 So.2d 610 (Fla. App. 1965).

the same crimes which he had previously abandoned.<sup>90</sup>

Furthermore, the State Attorney's discretion to plea bargain in capital cases is not only unregulated by post-*Furman* Florida Statutes and rules, but indeed, encouraged. Rule 3.170(g) Florida Rules of Criminal Procedure states:

The defendant, with the consent of the court and of the prosecuting attorney, may plead guilty to any lesser offense than that charged which is included in the offense charged in the indictment or information or to any lesser degree of the offense charged.

Rule 3.171(a), Florida Rules of Criminal Procedure states:

The prosecuting attorney is encouraged to discuss and agree on pleas which may be entered by a defendant. Such discussion and agreement must be conducted with the defendant's counsel or, if the defendant is unrepresented, may be conducted with the defendant.<sup>91</sup>

<sup>90</sup>Fla. R.Crim. Proc. 3.191(h)(2): An accused's right to a speedy trial cannot be avoided by the State by entering a *nolle prosequi*. See *State ex rel Green v. Patterson*, 179 So.2d 544 (Fla. App. 1973).

<sup>91</sup>The 1972 Committee Note to this Rule correctly observes that "most criminal cases are disposed by pleas of guilty arrived by negotiations between the prosecutor and defense counsel."

THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: *The Court* 9 (1967) estimates that approximately ninety per cent of all criminal cases are resolved via plea-bargaining.

Compare *Shelton v. United States*, 242 F.2d 101 (5th Cir.

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If the State Attorney agrees to dispose of a potentially capital case before the return of an indictment, the "consent of the court"<sup>92</sup> to such an agreement can be obviated. For in Florida, defendants have a legal right to plead guilty to a criminal charge.<sup>93</sup>

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1957), rev. on reh. 246 F.2d 571, Rev. 356 U.S. 26 for the view that "[j]ustice and liberty are not the subject of bargaining and barter."

<sup>92</sup>Fla. R.Crim.Proc. 3.170(2)

Under the state attorney's authority to "contract with a criminal for his exemption from prosecution. *Ingram v. Prescott*, 111 Fla. 320, 149 So. 369 (1933), he may file capital charges against one co-defendant but not against another equally culpable co-defendant.

<sup>93</sup>*Canada v. State*, 144 Fla. 633, 198 So. 220, (1940); *Eckles v. State*, 132 Fla. 526, 180 So. 764, 766 (1938). A trial court's power to reject a guilty plea is limited to those cases where the plea is "not entirely voluntary by one competent to know the consequence," or is "induced by the fear, misapprehension, persuasion, promises, inadvertence, or ignorance." *Reyes v. Kelly*, 224 So.2d 303, 305 (Fla. 1969):

"A trial court is not authorized to arbitrarily refuse to accept an unqualified plea of guilty made by a defendant on a non-capital case for any other reason.

There is no more reason to allow such action by a trial judge than there is to allow a defendant to withdraw such a plea at his pleasure. If a trial judge has the discretion to refuse only for cause permission to withdraw a plea of guilty, he should not be allowed, without cause, to reject such a plea. The right to enter such a guilty plea should be no less sacred than the right to enter a plea of not guilty."

224 So.2d at 306. See Fla. R.Crim.Proc. 3.160(c). A defendant may plead guilty to a capital offense. *Lamadline v. State*, 303 So.2d 17 (Fla. 1974). Where a defendant "plead[s] guilty in order to escape the electric chair," he gets "what he bargained for—a life sentence and . . . no right to complain." *Lewis v. State*, 93 So.2d 46, 47 (Fla. 1956).

Thus, if the State Attorney agrees to file an information for less than the capital offense in exchange for a guilty plea, the court is helpless to interfere.<sup>94</sup>

While the State Attorney is "encouraged" to plea-bargain, nothing in the Florida Statutes or criminal rules regulates when the State Attorney must, or must not, negotiate a plea. Yet the decision to negotiate or not to negotiate, made solely by the State Attorney, is "probably the most widely significant choice separating the doomed from those who . . . go to prison."<sup>95</sup> Without any guidance whatever, then, a State Attorney is free to decide whether a capital charge will be sought and prosecuted, and whether an accused will be permitted to save his own life by pleading guilty for a sentence less than the electric chair.<sup>96</sup> There is no

<sup>94</sup>For example, the perpetrator of a potentially capital murder and the State Attorney may agree, for reasons known only to them, that the proper disposition of the case would be a plea of guilty to the charge of Battery (Fla. Stat. Ann. §784.03 (2975-76 Supp.)). The State Attorney would then file an information charging battery and the defendant would announce his intention to plead guilty to that charge. The trial judge would be forced to accept the plea and that would be the end of the potentially capital murder. Of course, the judge would have the discretion to sentence up to the maximum penalty provided by law for the offense. The maximum penalty for Battery is one year in the country jail. (Fla. Stat. Ann. §775.082 (1975-76 Supp.)).

<sup>95</sup>BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE, 43 (1974).

<sup>96</sup>See e.g. *State v. Riley Burchfield*, Appendix A-92.

The defendant's wife was having an affair with another man and the defendant told her that if he ever caught her, he would kill her child; his stepson. After an argument the defendant

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redress from these prosecutorial decisions for the relatively few defendants who are indicted for a capital offense and with whom the State Attorney elects not to negotiate.

## 2. Jury Discretion

Although express sentencing discretion is conferred upon the trial judge by Fla. Stat. Ann. § 921.141 (1975-1976 Supp.), the jury has complete discretion to spare a capital defendant's life by convicting him of a lesser offense.

The indictment in Petitioner's case charged first degree murder. It alleged:

"... that CHARLES WILLIAM PROFFITT on the 10th day of July, 1973, in the County and State aforesaid, unlawfully and from a premeditated

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picked up a pistol, walked into the child's bedroom and, while the four year old boy slept, held the gun about a foot from the child's chest and pulled the trigger. Burchfield plead guilty to first degree murder in exchange for a life sentence. *State v. Jim Elley*, Appendix A-42: The defendant and two others forced an elderly woman to get into his car. They drove the woman to an isolated area, robbed her, and then strangled and beat her to death. Elley pled guilty to first degree murder in exchange for a life sentence. *State v. Gary H. Tillman*, Appendix A-58. The defendant and another man abducted an eleven year old boy as he was riding his bicycle to the neighborhood convenience store. They took him to an isolated area and the defendant sexually molested the boy, beat him repeatedly with a metal object, cut open his stomach in "field dress" style, and dismembered his body. His accomplice cut off the boy's penis and took it home with him. Tillman pled guilty to first degree murder in exchange for a life sentence.

design to effect the death of JOEL RONNIE MEDGEBOW by stabbing him to death with a knife . . . ." (R1)

Rule 3.490, Florida Rules of Criminal Procedure states:

If the indictment or information charges an offense which is divided into degrees, without specifying the degree, the jurors may find the defendant guilty of any degree of the offense charged: if the indictment or information charges a particular degree the jurors may find the defendant guilty of the degree charged or of a lesser degree. The court shall in all such cases charge the jury as to the degrees of the offense.

Since the offense charged (first degree murder) is divided into degrees Petitioner's jury was instructed that it might convict him of first degree murder (R473), second degree murder (R476), third degree murder (R477), or manslaughter. (R477)<sup>97</sup>

<sup>97</sup>A trial court's refusal to grant a lesser-degree instruction is reversible error. *Little v. State*, 206 So.2d 9, 20 (Fla. 1968); *Bailey v. State*, 224 So.2d 296, 199 (Fla. 1969). Instructions on the lesser included offenses may not be refused by the trial court on the ground that there is no evidence to support them; and a conviction for a lesser offense will be affirmed on appeal despite its lack of evidentiary support.

"This Court is now definitely committed to the rule that wherever evidence is sufficient to sustain a charge of murder in the first degree, whether committed in the perpetration of certain felonies or whether from a specific premeditated design [,] a verdict convicting a defendant of a lesser degree of homicide will not be disturbed even though there is no evidence of the particular degree of the offense for which he might be convicted. We have taken the view that the responsibility of determining the degree of guilt in such cases rests peculiarly within the bosom of

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Although the respective crimes are defined in terms of elements that are theoretically distinct and mutually exclusive, the imprecision of the definitions allows the jury wide latitude to shape its guilty verdict so as to

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the trial jury . . . [T]he Court should in all cases instruct the jury on the various degrees of the offense charged in the indictment. When the offense charged is first degree murder, whether grounded on specifically alleged premeditated design, or whether committed in the perpetration of certain felonies . . . the defendant is entitled to have the jury advised on all the degrees of unlawful homicide, including manslaughter. There should be a further instruction that it is in the province of the jury to determine the degree."

*Brown v. State*, 124 So.2d 481, 483 (Fla. (1960)). Moreover, a defendant charged with first degree murder may, as in this case, have his jury instructed on other non-capital offenses which are not lesser degrees of homicide but which are "necessarily included" in charges of first degree murder: Rule 3.510, Fla. R. Crim. Proc.

The theory upon which convictions of lesser offenses unsupported by and inconsistent with the evidence are affirmed appears to be that a defendant will not be heard to complain if the jury convicted him of a less severe offense than the crime for which he was originally charged. This "jury pardon" is a clearly recognized mechanism for the discretionary dispensation of mercy by the jury.

"[u]nder our system of jurisprudence, the jury had the right to convict defendant of any lesser degree of the crime charged, and it made no difference whether the elements of this degree of the crime were included in the specific allegations of the indictment or information. Such a verdict convicting a defendant of a lesser degree even in the absence of proof is sometimes referred to as a 'jury pardon' of the highest degree of the crime.

*Bailey v. State*, 224 So.2d 296, 297 (Fla. 1960)

avoid or permit the imposition of the death penalty<sup>98</sup> (such an action is made more likely when, as here, the *voir dire* examination is permeated with questions dealing with the prospective juror's willingness to recommend a death sentence.

For example, "premeditation", the distinguishing characteristic of first degree murder, has been variously defined as the "formation of a distinct purpose to take the life of another";<sup>99</sup> a "distinct definite purpose to take the life of another";<sup>100</sup> a "fully formed conscious purpose to kill";<sup>101</sup> or simply a "prior intention to do the act in question".<sup>102</sup>

<sup>98</sup>As Mr. Chief Justice Burger pointed out in *Furman*, "there is no assurance that sentencing patterns will change so long as juries are possessed of the power to determine the sentence or to bring in a verdict of guilt in a charge carrying a lesser sentence; juries have not been inhibited in the exercise of these powers in the past." 408 U.S. at 401.

For example in Florida a jury may convict of a non-capital attempt, Fla. R. Crim. P. 3.510; it may recognize an amorphously defined defense such as insanity, see, e.g., *Davis v. State*, 44 Fla. 32, 32 So. 822 (1902); *Perry v. State*, 142 So.2d 528 (Fla. App. 1962), or self defense, see, e.g., *Linsley v. State*, 88 Fla. 135, 101 So. 273 or mitigation such as intoxication, see, e.g., *Gardner v. State*, 28 Fla. 113, 9 So. 835 (1891); it may find that a homicide is justifiable, see Fla. Stat. Ann. §782.02 (1975-1976 supp.); or excusable, See Fla. Stat. Ann. §782.03 (1965); or it may simply refuse to convict in spite of the evidence—a not infrequent phenomenon when the death penalty is involved, see, Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. PA. L. REV. 1009, 1012, N. 18 (1953).

<sup>99</sup>*Hines v. State*, 227 So.2d 334 (Fla. App. 1969).

<sup>100</sup>*Polk v. State*, 179 So.2d 236 (Fla. App. 1965).

<sup>101</sup>*Weaver v. State*, 220 So.2d 53 (Fla. App. 1969).

<sup>102</sup>*Lowe v. State*, 105 So. 829 (Fla. 1925).

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For the second degree murder it is not necessary to show "premeditation" but the State must prove a "depraved mind regardless of human life."<sup>103</sup>

"[d]epravity of mind is an inherent deficiency of moral sense and rectitude. . . . It is the equivalent of the statutory phrase 'depravity of heart' which has been defined to be the highest grade of malice. . . .

It is obvious. . . that the phrase "evincing a deaved mind regardless of human life," as used in the statute. . . denouncing murder in the second degree, was not used in the legal or technical sense of the word 'malice' in the popular or commonly understood sense of ill will, hatred, spite, and evil intent. It is the malice of the evil motive which that statute makes an ingredient of the crime of murder in the second degree."

*Ramsey v. State*, 114 Fla. 766, 154 So. 855, 856 (1934).<sup>104</sup> Perhaps the average juror would distinguish

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"Premeditation may be inferred from evidence as to the nature of the weapon used, the manner in which the murder was committed and the nature and manner of the wounds inflicted."

*Hernandez v. State*, 273 So.2d 130, 133 (Fla. App. 1973). See also *Larry v. State*, 104 So.2d 352, 354 (Fla. 1958); *Rhodes v. State*, 104 Fla. 520, 140 So. 309, 310 (1932).

<sup>103</sup> Fla. Stat. Ann. §782.04(2) (1975-1976 Supp.)

<sup>104</sup> This case presents an illustration of the difficulty in distinguishing second degree murder from manslaughter since under the facts of the case the killing could have been either second degree murder, manslaughter, or self-defense, depending upon the interpretation given the facts. See also *Huntly v. State*, 66 So.2d 504, 507 (Fla. 1953); *Luke v. State*, 204 So.2d 359,

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first degree murder from second degree murder by looking to see whether the act in question evidence "a fully formed conscious intent to kill" or merely a "'depravity of heart' which has been defined as the highest grade of malice." The distinction becomes tenuous, however, when as in Petitioner's case, the issue of felony murder is introduced.<sup>105</sup>

First degree murder is defined as premeditated murder:

"...or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of seventeen years when such drug is proven to be the proximate cause of the death of the user. . ."

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362 (Fla. App. 1967); *Darty v. State*, 161 So.2d 864, 873 (Fla. App. 1964); *Smith v. State*, 282 So.2d 179, 189 (Fla. App. 1973); *Bega v. State*, 100 So.2d 455, 457 (Fla App. 1958). The crime of third degree murder in Florida is not, in terms of its elements, an intermediate offense between manslaughter and second degree murder. Third degree murder is instead a felony murder committed "without any design to effect death" in which the predicate felony is not arson, rape, robbery, burglary, kidnapping, aircraft piracy, or "the unlawful throwing, placing or discharging of a destructive device of bomb." Fla. Stat. Ann. §782.04(3) (1974-2975 supp.). See *Johnson v. State*, 91 So.2d 185, 187 (Fla. 1956); *Grimes v. State*, 64 So.2d 920, 921 (Fla. 1953); *Tilman v. State*, 81 Fla. 558, 88 So. 377, 378 (1921).

<sup>105</sup> A conviction for first degree murder under a felony murder theory can stand even when an indictment is returned charging

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Fla. Stat. Ann., §782.04(1)(a) (1973). (emphasis added).<sup>106</sup>

Second degree murder is an imminently dangerous act evincing a depraved mind regardless of human life:

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premeditated murder, *Larry v. State*, 104 So.2d 352 (Fla. 1958); *Killen v. State*, 92 So.2d 285 (Fla. 1957); *Everett v. State*, 97 So.2d 241 (Fla. 1957).

<sup>106</sup> The special session of the 1972 legislature which passed this statute added the language "by a person engaged in" to the felony murder portion of the first degree murder statute. The old statute read:

(1) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or in the attempt to perpetrate any arson, rape, robbery, burglary, abominable and detestable crime against nature or kidnapping, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in §775.082.

The 1973 statute was slightly modified in the 1974 session of the Florida legislature. It now reads:

782.04 Murder.—

(1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed, or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, rape, sodomy, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person 18 years of age or older when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in chapter 775.

"... or when committed in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb..."

Fla. Stat. Ann. §782.04(2)(1973) (emphasis added).<sup>107</sup>

<sup>107</sup> Prior to the passage of this statute in the special session of the 1972 Florida legislature, the felony murder was applicable only to first degree murder. The old second degree murder. The old second degree murder statute read:

(2) When perpetrated by any act imminently dangerous to another, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, it shall be murder in the second degree and shall constitute a felony of the first degree, punishable as provided in §775.082, §775.083, or §775.084. Fla. Stat. Ann., §782.04(2) (1971).

The 1973 version of the statute was significantly modified in the 1974 session of the Florida legislature. It now reads:

(2) The unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without premeditated design to effect the death of any particular individual, shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in chapter 775.

(3) When a person is killed in the perpetration of, or in the attempt to perpetrate, any arson, rape, sodomy, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb by a person other than the person engaged in the perpetration of or in the attempt to perpetrate such felony, the person perpetrating or attempting to perpetrate such felony shall be guilty of murder in the second degree, which constitutes a felony of the first degree punishable by imprisonment for a term of years not exceeding life or as provided in chapter 775.

In *State v. Dixon, supra*, it was argued that the distinction between the two sections is illusory for the reason that the activity proscribed in first degree is also proscribed in second degree and, therefore, that one charged and convicted of one of the crimes could interchangeably be charged and convicted of the other.<sup>108</sup> This argument was dismissed by the majority, however:

<sup>108</sup> The problem of felony murder is compounded even more by the homicide statute, Fla. Laws 1973, Ch. 72-724 §3 amending Fla. Stat. §782.04 (1971). Section 3 (§782.04(2)(a)), which defines first degree murder, and §3 (§782.04(2)), which defines second degree murder, set forth a proscription against felony murder in virtually identical terms, so that both crimes encompass, and therefore proscribe, the exact same [sic] activity. Additional confusion is created by the fact that Fla. Laws 1973, ch. 72-274, §3 amending Fla. Stat. §782.04 (1971), provides: "The unlawful killing of a human being . . . when committed by a person engaged in the perpetration of or in the attempt to perpetrate any . . . unlawful throwing, placing or discharging of a destructive device or bomb . . . shall constitute a capital felony." That same activity is also an aggravating circumstance to be weighed by the sentencer when determining whether the death penalty should be inflicted on the capital offender. Florida Capital Punishment Act. §9 (§921.141(6)(d)). Furthermore, Fla. Laws 1973, ch. 72-724, §6(1), amending Fla. Stat. §790.161 (1971), provides that a person convicted of the same activity shall be guilty of a life felony, a capital felony or an aggravated capital felony, and each classification carries a different sentence. See Fla. Laws 1973, ch. 72-724, §§1-2 amending Fla. Stat. §§775.081(1), 775.082 (1974).

Note, *Florida's Legislature and Judicial Responses to Furman v. Georgia: An Analysis and Criticism*, 2 FLA. St. L.Rev. 108, 141 N. 181 (1974).

"...the statute does establish two separate and easily distinguishable degrees of crime, depending upon the presence of the defendant as a principal in the first or second degree." *Id.*, 283 So.2d at 11.<sup>109</sup>

To the contrary, in his dissent in *Dixon*, Justice Boyd found that:

"...the statute is inherently defective in that the distinctions between first and second degree murder are so ambiguous as to make it impossible for grand juries, petit juries, and judges to distinguish the difference. As written, the effect of these statutory provisions is that one who illegally causes the death on another while committing certain other felonies may be guilty of first degree murder, while in another trial, one who causes death to another under exactly the same circumstances may be guilty of second degree murder." *Dixon v. State* at 26, 27. (Footnote omitted).<sup>110</sup>

<sup>109</sup> The *Dixon* Court surmised that the "obvious intention" of the Florida legislature in enacting the present murder statute was to "resurrect the distinction between principals in the first or second degree on the one hand and accessories before the fact on the other." (*State v. Dixon, supra*, 283 So.2d at 11) which the legislature had abolished in 1957. See Fla. Stat. Ann. §776.011 (1973). However, the Florida legislature subsequently amended the elements of second degree felony-murder so that the crime occurs when a person is killed in the perpetration of the enumerated felonies "by a person other than the person engaged in the perpetration of or in the attempt to perpetrate" the felonies. Florida Laws 1974, c.74-383, §14. See note 111, *supra*. The legislature thereby rejected the Florida Supreme Court's theory of principals and addressed itself to felony-murder situations involving death caused by a police officer, victim, or bystander reacting to the underlying felony.

<sup>110</sup> In *Alvord v. State*, 322 So.2d 533 (Fla. 1975), Mr. Justice  
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The explanation offered by the majority in *Dixon*, that the difference between first and second degree felony murder is the same as the difference between a principal in the first or second degree to a crime, is subject to question. If the legislature had meant to distinguish between principals in the first and second degree, they should have made their intent pellucidly clear within the statute because another Florida statute has eliminated the common law difference between principals in the first degree, principals in the second degree, and accessories before the fact.<sup>111</sup> On its face

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England, in a separate opinion concurring in part and dissenting in part stated:

Defendant has challenged the applicable statute on the ground that the statutory distinction between first and second degree murder is unconstitutionally vague. I share Justice Boyd's doubts that any juror of common intelligence or most judges, can comprehend the distinction. See *State v. Dixon*, 283 So.2d 1, 16-27 (Fla. 1973) (Boyd, J., dissenting). The statute has recently been held constitutional by a majority of this Court, however, in *Dixon* and in *Alford v. State*, 307 So.2d 433 (Fla. 1975). I do not perceive any legal duties to include a refusal to follow fundamental jurisprudential concepts such as stare decisis ('let the decision stand') and judicial restraint. In the absence of intervening events of compelling legal significance, and none are presented with respect to the verbal vagueness between first and second degree murder, the Court should not overturn contemporaneous case merely because there have been personnel changes in the Court.

Mr. Justice England was appointed to the Florida Supreme Court after the decision in *State v. Dixon*, *supra*, at 541 N.I.

<sup>111</sup> Fla. State Ann. §776.01 (1975-1976 Supp.)

The Statutes in effect at the time of the *Dixon* decision and  
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the statute does not clearly make that distinction.<sup>112</sup>

Although some state legislatures have in the past

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of Petitioner's trial were:

776.01 Principal in first degree.—Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, is a principal in the first degree and may be charged, convicted and punished as such, whether he is or is not actually or constructively present at the commission of such offenses.

776.03 Accessory after the fact.—Whoever, not standing in the relation of husband or wife, parent or grandparent, child or grandchild, brother or sister, by consanguinity or affinity to the offender, maintains or assists the principal or accessory before the fact, or gives the offender any other aid, knowing that he has committed a felony or been accessory thereto before the fact, with intent that he shall avoid or escape detection, arrest, trial or punishment, shall be deemed an accessory after the fact, and shall be guilty of a felony of the third degree, punishable as provided in §775.082, §775.084 Florida Statutes (1971).

The 1974 Florida legislature slightly modified the statute as follows:

\*777.011 Principal in first degree.—Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he is or is not actually or constructively present at the commission of such offense.

The intent of the statute is still the same. There is no difference in Florida between a principal in first degree, a principal in the second degree, and an accessory before the fact: they are all considered a principal in the first degree.

<sup>112</sup> A state court's construction of a statute can restrict its  
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attempted to make a distinction between the principal in the first degree and the other co-defendants by use of the language "a person engaged in the commission of, or in an attempt to commit" a felony, the courts have refused to follow this distinction; the situations and the words are not that clear. *E.g.*, *People v. Giro*, 197 N.Y. 152, 157-58, 90 N.E. 432 (1910). Being "engaged" in the commission of a felony has been read the same as "perpetrating" that felony. The federal courts have long held that all of the co-defendants in a felony are "engaged" in that felony under general common law principles. *United States v. Boyd*, 45 F. 851 (W.D. Ark. 1890), *rev'd on other grounds*, 142 U.S. 450 (1892); *cf. Stein v. New York*, 346 U.S. 156 (1953).

Concerning the degree of certainty and clarity required in criminal statutes this court in *Winters v. New York*, 333 U.S. 507 (1948) said that:

...The standard of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. The crime "must be defined with appropriate definiteness." *Cantwell v. Connecticut*, 310 U.S. 296; *Pierce v. United States*, 314 U.S. 306, 311. There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment. The vagueness

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facial vagueness sufficiently to render it constitutional. *See, e.g.*, *Wainwright v. Stone*, 414 U.S. 21 (1973). Nonetheless, a state court's effort to save a facially vague statute is reviewable, and if the construction fails to refine or narrow ambiguous language, the construction is inadequate. *See, Lewis v. New Orleans*, 415 U.S. 130 (1974); *Winter v. New York*, 333 U.S. 507 (1948).

may be from uncertainty in regard to persons within the scope of the act, *Lanzetta v. New Jersey*, 306 U.S. 451, or in regard to the applicable tests to ascertain guilt.<sup>113</sup> 333 U.S. at 515, 516.

The issue is whether men of common intelligence would understand the difference between the phrase "...when committed by a person engaged in the perpetration of... (the listed felonies)" [first degree murder] and the phrase "...when committed in the perpetration of... (the listed felonies)" [second degree murder]. Petitioner suggests that there is little, if any difference between the two phrases. The person, in first degree murder who is "engaged," is "engaged" in the felony which unintentionally causes murder;<sup>114</sup> this is exactly the same as the person in second degree murder who is "committing" the felony which causes the unintentional murder. A person who is engaged in a crime obviously is committing an act during the commission of that crime; conversely, during the commission of a criminal act everyone, under the consolidation of principals statute,<sup>115</sup> is engaged in doing that act.

Webster's New Collegiate Dictionary<sup>116</sup> defines "engage," "commit" and "perpetrate" as follows:

<sup>113</sup> *See also, Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Gooding v. Wilson*, 405 U.S. 518 (1972); *Watson v. Stone*, 148 Fla. 516, 518-19, 4 So.2d 700, 701 1 (1941).

<sup>114</sup> A felony murder is an unintentional murder, otherwise the homicide is within the premeditated portion of the statute. *See People v. Washington*, 62 Cal.2d 777, 781, 402 P.2d 130, 133, 44 Cal.Reptr. 442, 445 (1965); *Commonwealth v. Balliro*, 349, Mass. 505, 512, 209 N.E.2d 308, 312 (1965); *Commonwealth v. Kelly*, 333 Pa. 280, 386-88, 4 A.2d 805, 808 (1939); *Cf. Leavine v. State*, 109 Fla. 447, 147 So. 897 (1933).

<sup>115</sup> *See: Note 111 infra.*

<sup>116</sup> Webster's New Collegiate Dictionary (1975).



engage — being actively involved in or committed. . .

commit — to carry into action deliberately . . . to perpetrate

perpetrate — to bring about or carry out: commit.

The plain meaning of the words show that there is no clear distinction between the phrase "...when committed by a person engaged in the perpetration of..." and the phrase "...when committed in the perpetration of..." Yet those phrases purport to delineate the difference between a capital crime (first degree murder) and a non-capital crime (second degree murder).

The same factual situation that will support a charge of second degree felony murder will also support a charge of first degree murder.<sup>117</sup> There are no definite characteristics or essential elements of first degree felony murder which are not also characteristic and essential to second degree felony murder. The statute provides no guidelines to be followed by either the state attorney or the grand jury in their determination whether to charge the capital offense. Nor does it provide the petit jury with even a hint of what facts distinguish second degree felony murder from first degree felony murder. The statute thus "impermissibly delegates basic policy matters to police-

<sup>117</sup> For example, assume two men decided to rape a female. One man held her while the other attempted to sexually assault her. During the struggle she fell, hit her head on a rock, and died. Was her murder caused by "...a person engaged in the perpetration of ...rape" and, therefore, first degree murder? (Or was her murder "...committed during the perpetration of ...rape" and, therefore, second degree murder?)

Assume two men decided to burn a building. One poured gasoline on the building and the other lit the match. Unbeknown to either perpetrator, a man was inside the building and died as a result of the fire. Is it reasonable to say that the death resulted while the arsonists were "...engaged in the perpetration of ...arson"? Is it now also reasonable to conclude that the

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men, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. Rockford*, 108-109 (1972).

### 3. Executive Clemency

The Governor of Florida, with the "approval of three members of the cabinet:, may be executive order commute a death sentence to a sentence of life imprisonment."<sup>118</sup> Clemency in Florida is considered "an act of grace proceeding from the power entrusted with the execution of the laws."<sup>119</sup> The Governor initially has sole discretion to determine whether a case merits consideration for executive clemency.<sup>120</sup> Although the Governor must report his grants of clemency to the legislature,<sup>121</sup> there are no standards whatsoever for the exercise of the commutation power after the Governor has decided to review a case. Thus, the reduction of a legally authorized

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murder was "...committed during the perpetration of ...arson"?

In these situations there is no reasonable and meaningful distinction between first and second degree felony murder.

<sup>118</sup> Fla. Const., Art. IV. §8(a) (1968). If a capital prisoner's death sentence is commuted to life, he must serve a minimum of twenty five years before becoming eligible for parole. See Fla. Stat. Ann. §775.082(1) (1975-1976 Supp.).

<sup>119</sup> Rules of Executive Clemency of Florida, Rule 1 (1975).

<sup>120</sup> *Id.*, Rule 4.

<sup>121</sup> Fla. Stat. Ann. §940.01 (1973).

sentence, after it has left the hands of the judiciary,<sup>122</sup> is committed to the unfettered discretion of the executive branch. *Davis v. State*, 123 So.2d 703, 711 (Fla. 1960); *Johnson v. State*, 61 So.2d 179 (Fla. 1952); *La Barbara v. State*, 63 So.2d 654, 655 (Fla. 1953); *Sawyer v. State*, 148 Fla. 542, 4 So.2d 173 (1941); *Chavigny v. State*, 112 So.2d 910, 915 (Fla. App. 1959).

The Florida Supreme Court has recognized that the executive has "broad and wide discretion in . . . commuting punishments." *Ex parte White*, 161 Fla. 85, 178 So. 876, 880 (1938). Indeed, in that case the Court held unconstitutional a statute that required the Governor and his cabinet (who constituted the Board of Pardons under the 1885 Constitution) to afford clemency any time the Court affirmed a death sentence by an equally divided court. *Id.*

One study of clemency in Florida capital cases between 1960 and 1962 revealed nine executions and three commutations of death sentences of life imprisonment during this period.<sup>123</sup> There appears no reason to assume that the 33% clemency rate is typical or will

<sup>122</sup> See e.g., Fla. R. Crim. Proc. 3.800 (1975).

<sup>123</sup> Note, *Executive Clemency in Capital Cases*, 39 N.Y.U.L. Rev. 136, 191 (1964).

decrease under the new Florida capital punishment legislation.<sup>124</sup> Quite probably a significant, albeit irrationally selected, group of capital defendants will continue to be spared through the exercise of executive clemency.<sup>125</sup>

<sup>124</sup> Reubin Askew, who has been Governor of Florida since 1971, stated during the 1972 hearings on the proposed death penalty legislation that he continued to have "mixed feelings as to the necessity, the rightness, and even the legality of capital punishment in any form." FLA.HR.JOUR., Spec. Sess. 6 (1972). Thus, it is likely that Askew will use his persuasive position as Governor to prevent execution of any death sentences during his term. However, whenever a different governor takes office, the unreviewable granting or denying of commutations will proceed according to different standards.

<sup>125</sup> Another way in which the Governor may avoid or permit the imposition of a death sentence, quite separate from granting clemency, is provided by Fla. Stat. Ann. §922.07 (1973). If the Governor is informed that a condemned defendant "may be insane, he shall stay execution of the sentence and appoint a commission of three psychiatrists to examine the convicted person." §922.07(1). After receiving the commission's report, the Governor may determine "that the convicted person has the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him", §922.07(a) and issue a death warrant, or he may determine that the convicted person lacks the mental capacity, §922.07(3), and issue an order committing him to the state hospital for the insane. See *Ex Parte Chessier*, 93 Fla. 291, 111 So. 720 (1927); *Hysler v. State*, 135

(continued)



## III

**THE DEATH PENALTY IS AN EXCESSIVELY CRUEL PUNISHMENT THAT IS ARBITRARILY AND IRRATIONALLY APPLIED, THAT IS INCONSISTENT WITH CONTEMPORARY STANDARDS OF DECENCY, AND THAT NO LONGER SERVES ANY PENAL PURPOSE MORE EFFECTIVELY THAN LESS EXTREME PUNISHMENTS.**

Petitioner's sentence of death pursuant to the new Florida legislation is inconsistent with contemporary standards of decency, and, thus, inherently violates the essential guarantees of the Eighth and Fourteenth Amendments.

The interrelated prevailing opinions of this Court in *Furman* reviewed the history of this country's use of the punishment of death and concluded that, although the extreme penalty was then authorized by law in forty-one American States (and by the federal govern-

*(footnote continued from preceding page)*

Fla. 563, 187 So. 261 (1939). This determination is committed entirely to the discretion of the Governor, and no provision is made for any participation by the condemned defendant (except for the representation by counsel during the psychiatric examination) or for judicial review of the Governor's decision. Since §922.07(4) provides that when a defendant "has been restored to sanity", he may be executed, the motivation of any "insane" condemned man to regain mental health appears highly questionable. Some might be sane enough to feign insanity and thus postpone electrocution. Others might be crazy enough to cure themselves into oblivion. The outcome in any particular case will, of course, be ultimately determined by the discretionary decision of the Governor.

ment and the District of Columbia), it was in fact so rarely and so arbitrarily inflicted under discretionary sentencing procedures that it constituted a cruel and unusual punishment. This conclusion was reached because of the occasional and virtually random extinction of human life was a cruelty compounded by inequity, and because the very randomness and rarity of the punishment belied any claim that it fulfilled an accepted or acceptable penal purpose.

In Part II of this brief, we have demonstrated that the use of the death penalty remains arbitrary, random and wanton under Florida's post-*Furman*, discretionary capital sentencing statute because that statute provides numerous mechanisms which express and implement the unwillingness of prosecutors, juries, judges, Florida Supreme Court justice and the Governor to accept a general, uniform and even-handed application of the death penalty. These selective mechanisms and their use continue to be the means by which a punishment incapable of general or substantial application is reserved for imposition on a powerless and anonymous few. The Florida procedure continues to violate the principles applicable under the Cruel and Unusual Punishments Clause of the Eighth Amendment.

The punishment of death is an unusually severe and degrading punishment that is inflicted arbitrarily, that has been virtually totally rejected by contemporary society as a denial of human dignity, and that serves no penal purpose more effectively than the less severe punishment of life imprisonment. *Furman v. Georgia*, *supra*, 408 U.S. at 257-306 (concurring opinion of Mr. Justice Brennan); *Id.*, at 314-374 (concurring opinion of Mr. Justice Marshall). When measured by contemporary

standards of human decency, the punishment of death "stands condemned as fatally offensive to human dignity" under the Eighth Amendment, *Furman v. Georgia*, *supra*, 408 U.S. at 305 (concurring opinion of Mr. Justice Brennan), and the reasons therefore have been discussed at length in the Brief of Petitioner, *Fowler v. North Carolina*, No. 73-7031, at 102-139. Thus, the Petitioner will not here burden the Court with a recapitulation of this discussion and documentation, and he respectfully directs the Court's attention to the cited pages of the Brief of Petitioner in the *Fowler* case.

The Petitioner in the present case, also submits that additional considerations<sup>126</sup> arising from the unique nature of the punishment of death require a uniquely stringent standard of judicial review under "the evolving standards of decency that mark the progress of a

<sup>126</sup> *First*, the basic concept underlying the Eighth Amendment is nothing less than the dignity of man." *Trop v. Dulles*, 356 U.S. 86, 100 (1958). *Second*, "the death penalty bears an awesome and irrevocable finality incomparable with other punishment." *Third*, "any balancing process which sets out to weigh the penalty of death in the pans of the Eighth Amendment must begin with the proposition that capital punishment is self-evidently cruel within every meaning of that word which is civilized, Twentieth Century society can accept." *Fourth*, "the compatibility of the death penalty with Eighth Amendment values is called into question by its *de jure* or *de facto* abandonment among civilized nations." *Fifth*, "long-standing traditions defining the judicial rule in capital cases recognize the need for close scrutiny of the punishment of death." *Finally*, "in suggesting that sort of scrutiny, we ask no more of the Court than society itself demands." Brief of Petitioner, *Fowler v. North Carolina*, No. 73-7031, at 107-120 (footnotes omitted).

maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). We join Petitioner Fowler in his position that:

"Such [a stringent] examination requires that the Court determine whether the manifest cruelty of taking human life is or is not "justified by the social ends it [is]...deemed to serve." Because of the unique character of the death penalty, those justifications must be real and substantial, and they must conform to the fashion in which the penalty is applied in fact. If less drastic means for achieving the same basic purpose are available, the State must use them rather than indulge in the "pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. This much is implied in "the duty of [the]...Court to determine whether the action [of killing people] bears a reasonable relationship to the achievement of the governmental purpose asserted as its justification, or whether, conversely, the punishment of death is excessive and therefore unconstitutional."

Brief of Petitioner, *Fowler v. North Carolina*, No. 73-7031, at 120-121 (footnotes omitted). We concur that it "must be demonstrated that the uniquely harsh punishment of death is better fitted to the effectuation of the permissible purposes of the criminal law than other kinds of available criminal penalties, *Id.*, at 122:

Reluctant, unpredictable and spotty application of the death penalty deprives it of the least capacity to server its supposed penal functions. As a deterrent, it is wholly incredible; as a disabler, it is as useless and fortuitous as it is unnecessary; as an instrument of retribution, it is inadequate, haphazard, and unjust.

The few men whom it kills die for no reason; they are executed "in the name of a theory in which



the executioners do not believe." Distaste for the penalty grows, and fewer men are killed as society "watch[es] without impatience its gradual disappearance."

*Id.*, at 139 (footnotes omitted).

### CONCLUSION

Petitioner was sentenced to die pursuant to Florida Statute 921.141. The imposition and carrying out of the death penalty under such a statute is violative of the provisions of the Eighth and Fourteenth Amendments to the United States Constitution.

The judgment of the Florida Supreme Court affirming Petitioner's sentence of death should be reversed.

Respectfully submitted,

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### NOTE TO APPENDIX

APPENDIX A. This compilation of cases was originally submitted to the Florida Supreme Court on July 30, 1975 as an Appendix to the Brief of Appellant in the case of *George Thomas Vasil v. State of Florida*, Fla. Sup. Ct. No. 46,654 (decision pending).

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**DEFENDANTS:**

Name: GARDNER, DANIEL WILBUR  
Age: 39 years  
Race: White  
Crime: First Degree Murder

**SOURCE OF INFORMATION:**

Record reviewed at Florida Supreme Court

**TRIAL PROCEEDINGS:**

Circuit Court, Citrus County, File #

**JURY RECOMMENDATION:**

Life

**SENTENCE OF COURT:**

Death; Judgment entered January 30, 1974.

**APPELLATE PROCEEDING:**

Supreme Court, Case No. 45106

**SUMMARY OF THE CASE:**

GARDNER and his wife got into an argument at their trailer at about midnight on June 29, 1973, regarding the whereabouts of their four children. Both had been drinking throughout the day, GARDNER particularly heavily and on an empty stomach. When his wife refused to reveal the whereabouts of the children, GARDNER became enraged and began to beat her. Noises were heard throughout the night by GARDNER'S mother-in-law, who lived in an adjoining trailer, but neither she nor her boyfriend investigated. GARDNER states that he tried to waken his wife the following morning, could not do so, and got in touch with his mother-in-law next door, who finally called the police. The victim had bruises, contusions and cuts on her legs and around her pubic area and bled profusely from her vagina and liver. The Coroner's Report stated that the cause of death was loss of blood.

A plea of not guilty was entered. Following trial, the jury returned a verdict of guilty and recommended life imprisonment. The court made a separate finding of fact, overruled the jury, and sentenced the Defendant to death.

**COMMENT:**

The Court apparently considered this brutal beating death to be intentional and particularly heinous, atrocious and cruel. The Court found no mitigating circumstances, even the fact that the Defendant had consumed and excessive amount of alcohol.

**DEFENDANTS:**

Name: MC CASKILL, JAMES  
WILLIAMS, OTIS TERRY  
Age: both 23 years  
Race: Black  
Crime: First Degree Murder

**SOURCE OF INFORMATION**

Record reviewed at Florida Supreme Court

**TRIAL PROCEEDINGS:**

Circuit Court, Orange County

**JURY RECOMMENDATION:**

Life for both Defendants

**SENTENCE OF COURT:**

Death for both Defendants  
Judgments entered on December 6, 1973.

**APPELLATE PROCEEDINGS:**

Supreme Court, Case Numbers: MC CASKILL-45009;  
WILLIAMS-45010

**SUMMARY OF THE CASE:**

The incident occurred at an ABC Package Liquor Store

in Orange County, on August 29, 1973 at about 10 p.m. Three men entered the store, masked and armed, and proceeded to rob the patrons. During the course of the robbery, two men were shot, and a third was killed as he pursued the three men out into the parking lot. There was a question at the trial of the identity of the gunmen because they are masked. State witnesses, customers and employees of the store at the time of the robbery, identified two of the gunmen as the co-defendants. It was also uncertain as to who did the actual shooting, although one witness did identify WILLIAMS as the assailant.

Pleas of not guilty were entered. MC CASKILL and WILLIAMS were tried together. The jury returned a verdict of guilty and recommended life imprisonment for MC CASKILL by a vote of 11 to 1 and for WILLIAMS by a vote of 7 to 5. The Court overruled the jury and sentenced MC CASKILL and WILLIAMS to death.

In its separate findings of facts regarding MC CASKILL and WILLIAMS, the Court concluded that they had just committed and were fleeing a robbery, but they knowingly created a great risk to many persons, that the capital felony was committed for pecuniary gain, and that the crime was especially heinous, atrocious and cruel. In addition, WILLIAMS had a prior criminal history, including convictions for auto theft and breaking and entering. The Court noted MC CASKILL'S lack of prior criminal record and considered the age of both men as a mitigating factor, but concluded that men of 23 years of age, should exercise sound judgment.



**COMMENT:**

This case might be contrasted to that of PUGH and TROWELL, where life sentences were given to two defendants because the Judge said that it was not who proved who fired the shots, so that no death penalty will be given for *either*.

**DEFENDANT:**

Name: OWENS, HOUSTON, JR.  
 Age: 21 years  
 Race: Black  
 Crime: Rape of 9 year old child

**SOURCE OF INFORMATION:**

Record reviewed at District Court of Appeal.

**TRIAL PROCEEDINGS:**

Circuit Court, Escambia County, Case No. 73-S75.

**JURY RECOMMENDATION:**

Life

**SENTENCE OF COURT:**

Life; Judgment entered August 22, 1973.

**APPELLATE PROCEEDINGS:**

District Court of Appeal, First District, Case No. U-177

Affirmed in an Opinion by Justice McCord, September 10, 1974.

Supreme Court: Case No.

OWENS appealed to the Supreme Court in a *pro se* proceeding.

**SUMMARY OF THE CASE:**

OWENS was indicted for the rape of a 9 year old white child in Escambia County on February 12, 1973. The victim was sent to the grocery store on an errand for her mother, at about 4 p.m. one afternoon. She returned home about 4:20 p.m. with her clothes torn and her body covered with dirt and scratches. She said that she had been grabbed from her bicycle on her way home, dragged into the woods and raped by OWENS whom she identified from clothing and an earring he had been wearing. Evidence of actual vaginal penetration was circumstantial as the child was bleeding so profusely that experts testified that any semen that might have been found had been washed away in the blood flow. The child was not beaten or otherwise harmed.

OWENS plead not guilty and had several witnesses to testify that he had been with them during the entire time in question. The jury found him guilty of rape of a child. At the sentencing hearing, the defense stipulated that if the jury recommended death, the Judge would order a psychiatric examination and the Judge said if the jury recommended death, he would order a Pre-Sentence Investigation. The only aggravating

circumstance was a prior conviction for robbery. The defense raised no mitigating circumstances, observing that before the verdict was returned, the jury had asked if they would be able to recommend mercy if they found OWENS guilty. The jury did in fact recommend mercy.

At the pronouncement of sentence, the Judge sentenced OWENS to life in prison rather than death, based on the recommendation of the jury and also on his oral finding of fact that OWENS was only 21 years old, that he could possibly be paroled and become a productive citizen, and the fact that he did not attempt to take any lives in the commission of the crime.

The case was appealed to the First District Court of Appeal, one point of appeal being the constitutionality of the 15-year/without parole life sentence. The lower court decision was affirmed by the DCA in an opinion written by Justice McCord ruling that statutory provision constitutional. OWENS is appealing his case to the Florida Supreme Court *pro se*. The Supreme Court affirmed.

#### DEFENDANT:

Name: DEAN, DONALD QUINCEY  
Age: 34 years  
Race: White  
Crime: First Degree Murder

#### SOURCE OF INFORMATION:

Record reviewed at First District Court of Appeal.

#### TRIAL PROCEEDINGS:

Circuit Court, Duval County, Case No. 73-3913-CF

#### JURY RECOMMENDATION:

Life (Unanimous)

#### SENTENCE OF COURT:

Life; Judgment entered on February 1, 1974.

#### APPELLATE PROCEEDINGS:

District Court of Appeal, First District, Case No. V-165.

#### SUMMARY OF THE CASE:

DEAN hired co-defendant CLIFTON WAYNE ROWELL to kill DEAN'S bookkeeper who allegedly knew too much about DEAN'S dealings in drugs and stolen goods. The record is replete with descriptions of lurid sexual affairs and criminal activity, appellant's brief in the First District Court of Appeal describing it as "degrading" and "revolting" conduct, a "sordid" account of the lives and lifestyles of people who respect neither themselves, their families, friends, or the law.

The record indicates that ROWELL was the state's main witness. He testified that DEAN had hired him to kill the intended victim and that on several previous occasions DEAN had asked him to harass her by doing such things as slashing her car tires, planting drugs in



her car, shooting at her trailer and securing false affidavits to have her committed to Macclenny. All of this ROWELL said he did for \$50.00. While the woman and her husband and child were asleep in their trailer, ROWELL fired several shots into the trailer. It was the intended victim's husband who was actually killed in the barrage.

The record indicates that prosecution and defense stipulated that the aggravating circumstances were that ROWELL knowingly created great risk of death to many persons by shooting indiscriminately into the trailer and that the murder for hire was especially heinous, atrocious and cruel. They also stipulated that the only mitigating circumstances was that DEAN had no prior criminal record. The defense also testified that DEAN had been a police informant. A pre-sentence investigation was ordered at the request of the defense. Transcript of the sentencing hearing is not included in the record on appeal. The jury advised a life sentence.

A jury trial was held, DEAN found guilty of first degree murder.

The Judge did not make a separate finding of fact when he sentenced DEAN to life in prison.

DEAN was portrayed at the trial as a generally "bad guy" who had been involved in extensive drug dealing and receiving stolen goods in Duval County, extramarital affairs with various women including the intended victim and the wife of ROWELL and other extralegal activities.

## DEFENDANT:

Name: REGISTER, JOHNNY E.  
Age: 44  
Race: White  
Crime: First Degree Murder

## SOURCE OF INFORMATION:

Record reviewed at First District Court of Appeal

## TRIAL PROCEEDINGS:

Circuit Court, Hamilton County, Case No. 74-18

## JURY RECOMMENDATION:

Life

## SENTENCE OF COURT:

Life, Judgment Entered on May 14, 1974.

## APPELLATE PROCEEDINGS:

District Court of Appeal, First District, Case No. W-104  
Affirmed in *per curiam* decision without opinion,  
November 21, 1974.

## SUMMARY OF THE CASE:

REGISTER, age 44, white, was indicted for the shooting murder of EDDIE LEE MILLER, age 75,

white, in REGISTER'S front yard. REGISTER and MILLER were friends and MILLER was, in fact, staying with REGISTER and his parents at the REGISTERS' home. On the day of the murder, both men had been drinking. REGISTER had some sample ballots for an upcoming election which MILLER refused to help distribute. MILLER was known to wear a holster and to carry two guns in his car. During the discussion, MILLER said that he was going to get his gun, and he went outside. REGISTER went to his bedroom, got his gun from under the bed and loaded it. He went to the front porch, saw MILLER coming back into the yard—but testified that he did not see a gun—and shot MILLER several times. The only witness to the shooting, who was passing by on the street, testified that MILLER was crouched down on his knees as REGISTER kept firing and that MILLER had no gun. After the shooting, REGISTER went back into the house and his mother went to MILLER'S assistance. MRS. REGISTER called her son to help her, and they took miller to the hospital where he died about three weeks later.

The defense pled not guilty by reason of self-defense, but the jury found REGISTER guilty of first degree murder and recommended a life sentence. At the sentencing hearing, the prosecution relied on testimony at the trial, saying that REGISTER had shot down an old man for no reason and that for that reason the crime was especially heinous, atrocious and cruel. The defense said that there were no aggravating circumstance, that REGISTER took the victim to the hospital, and that mitigating circumstances were that REGISTER

had no significant prior criminal activity except for several charges connected with drunkenness, that his drinking that day has lowered his capacity to appreciate the criminality of his doncut, and that his being a middle-aged man with no trouble before, showed that this was a spur-of-the moment drunken behavior not likely to be repeated.

In completing a form furnished them by the Court, the jury indicated that they found no aggravating circumstances, and that they considered mitigating circumstances to be that REGISTER had no significant prior criminal activity, that the crime was committed while REGISTER was under extreme mental or emotional disturbance, and that his capacity to appreciate the criminality of his conduct was impaired. The Judge made no separate finding of fact for the record.

#### **DEFENDANT:**

Name: MANNING, DAVID EARL  
 Age: 22 years  
 Race: White  
 Crime: First Degree Murder

#### **SOURCE OF INFORMATION:**

Record reviewed at First District Court of Appeal.

#### **TRIAL PROCEEDINGS:**

Circuit Court, Liberty County



**JURY RECOMMENDATION:**

Life

**SENTENCE OF COURT:**

Life; Judgment entered on August 7, 1973.

**APPELLATE PROCEEDINGS:**

District Court of Appeal, First District, Case No. U-156.  
Affirmed in *per curiam* decision, January 8, 1974.

**SUMMARY OF THE CASE:**

MANNING, a 22 year old white male was indicted by a Liberty County Grand Jury for the March 11, 1973, First Degree Murder of a 60 year old white male.

After an evening at a local pool hall where MANNING had some contact with the victim, MANNING went to the victim's trailer and cut his jugular vein with a broken catsup bottle.

MANNING pled self-defense, claiming a slight scuffle had ensued and that when he shoved the victim in self-defense, the victim fell on the broken catsup bottle. MANNING contacted the police the next morning.

The jury returned a verdict of guilty and recommend a life sentence.

The Court followed the jury's recommendation without issuing a finding of fact, and sentenced the defendant to life imprisonment.

It appeared from the record that the only aggravating circumstance was that the killing was especially heinous, atrocious and cruel.

It would further appear the only mitigating circumstances which existed was the defendant's age. The defense counsel also made reference to the defendant's marriage and employment.

**DEFENDANT:**

Name: WOOD, RICHARD L.  
Age: 23 years  
Race: Black  
Crime: First Degree Murder

**SOURCE OF INFORMATION:**

Record reviewed at First District Court of Appeal.

**TRIAL PROCEEDINGS:**

Circuit Court, Leon County, Case No. 73-139.

**JURY RECOMMENDATION:**

Life

**SENTENCE OF COURT:**

Life; Judgment entered May 22, 1973.

**APPELLATE PROCEEDINGS:**

District Court of Appeal, First District, Case No. T-499

**SUMMARY OF THE CASE:**

WOOD, a 23-year-old black man, was indicted for first degree murder in the stabbing death of a man in Frenchtown (Tallahassee) during a bar room fight. The defense claimed self-defense. The jury found WOOD guilty of first degree murder.

At the sentencing hearing, the prosecution said the murder was especially heinous, atrocious and cruel because the victim had died slowly from multiple stab wounds in the chest, back and neck. It was termed a "malicious" killing. The defense said that mitigating circumstances included that WOOD had no significant prior criminal activity (two arrests, no convictions), that the victim had participated in the fight, that WOOD was under extreme duress, that he was mentally impaired (he had been found medically/mentally unfit for military service) and that he was only 23 years old.

The jury recommended a life sentence and the judge concurred without making a finding of fact for the record.

**DEFENDANT:**

Name: ELKINS, WILLIE  
Age: 46 years  
Race: Black  
Crime: First Degree Murder

**SOURCE OF INFORMATION:**

Record reviewed at First District Court of Appeal.

**TRIAL PROCEEDINGS:**

Circuit Court, Alachua County, Case No. 73-345-CF

**JURY RECOMMENDATION:**

Life

**SENTENCE OF COURT:**

Life; Judgment entered on September 28, 1973.

**APPELLATE PROCEEDINGS:**

District Court of Appeal, First District, Case No. U-246.  
Affirmed in *per curiam* decision.  
Supreme Court, Case No. 45,757, Certiorari denied,  
October 11, 1974.

**SUMMARY OF THE CASE:**

ELKINS was indicted and convicted for the shooting murder of LEVI SMITH in Gainesville. ELKINS had gone to SMITH'S house one morning, a fight broke out between them. ELKINS testified that SMITH had asked him to perform a homosexual act and that he had refused. A third man who had been staying in the house with SMITH testified that he had separated the two and escorted ELKINS out the door. ELKINS went



to his car, took out his gun and shot SMITH on the front porch of the house. The record indicates that ELKINS may have intended to shoot the man who stopped the fight and that, in fact, ELKINS said as much to the police in a statement which the defense tried unsuccessfully to suppress.

ELKINS pled not guilty, was found guilty of first degree murder by a jury. At the sentencing hearing, the prosecution said that aggravating circumstances were (1) that by shooting his gun in a neighborhood, ELKINS had knowingly created a great risk of death to many persons, and (2) that because the victim was shot after the fight was over, sitting in his rocking chair on the porch without a weapon and without attempting to resume the fight, the crime was cold-blooded murder and especially heinous, atrocious and cruel. The defense did not raise any of the statutory mitigating circumstances, relying instead on arguments against the cruelty of the death penalty. The jury recommended a life sentence and the judge concurred.

#### **COMMENT:**

The Judge made no finding of facts for the record and he apparently discounted the prosecution's theory in support of the death penalty.

#### **DEFENDANTS:**

Names: PUGH, CARL LEE  
TROMWELL, PAUL S.  
Ages: Not available in record

Race: Black  
Crime: First Degree Murder

#### **SOURCE OF INFORMATION:**

Record reviewed at Fourth District Court of Appeal.

#### **TRIAL PROCEEDINGS:**

Circuit Court, Palm Beach County, Case No. PUGH: 73-1275; TROWELL: 73-1204.

#### **JURY RECOMMENDATION:**

Life

#### **SENTENCE OF COURT:**

Life; Judgment entered for both on October 16, 1973.

#### **APPELLATE PROCEEDINGS:**

District Court of Appeal, Fourth District, Case No. 73-1204 for TROWELL and Case No. 73-1275 for PUGH.

#### **SUMMARY OF THE CASE:**

TROWELL and PUGH were indicted for the first degree murder of the white night manager of an ABC Liquor Store.

On March 30, 1973, the defendants staked out the local ABC Liquor Store. They pretended that their car had broken down and watched until the night manager left the premises. They then followed the victim in their car until they arrived at a stop sign. Witnesses saw the passenger get out of the car, go up to the victim's car and fire one shot. The victim's car then proceeded down the road until it finally crashed. The victim was found dead. Separate trials were held before the same Judge. PUGH admitted participating but denied firing the shot. It was never definitely established at the trial which of the two defendants actually did fire the shot. Juries found TROWELL and PUGH guilty of first degree murder and recommended life sentences. The Judge determined that aggravating circumstances were that the murder was committed during a robbery, for a pecuniary gain. In addition, both defendants had prior criminal records and PUGH was on parole for a robbery involving the use of force. Although there were aggravating circumstances and no mitigating circumstances for each defendant, the Judge followed the jury's recommendation of a life sentence because it was not established at either trial who had actually shot the victim.

The Judge ordered pre-sentence investigations and filed written findings of facts in both cases.

#### **DEFENDANT:**

Name: MERCADO, VICTOR MANUEL

Age: 20

Race: White (Puerto Rican)

#### **SOURCE OF INFORMATION:**

Record reviewed at the Fourth District Court of Appeals

#### **TRIAL PROCEEDINGS:**

Circuit Court, Palm Beach County, Case No.

#### **JURY RECOMMENDATION:**

Life

#### **SENTENCE OF COURT:**

Life; Judgment entered September 17, 1973.

#### **APPELLATE PROCEEDINGS:**

District Court of Appeal, Fourth District, Case No. 73-1098

Affirmed in *per curiam* decision.

#### **SUMMARY OF THE CASE:**

MERCADO, a 20 year old Puerto Rican male, was indicted for the murder in the first degree in the shooting death of a 17 year old Puerto Rican male.

MERCADO and the victim were both employed at the



same restaurant. On February 20th, they got into a rather heated argument about employment. On February 22, 1973, MERCADO bought bullets for his pistol. He then went to the victim's house, and waited for his return. When a car pulled in a short time later, the victim got out of the car with a bottle in his hand and MERCADO shot him.

MERCADO claimed self-defense, alleging that the victim was coming at him with the bottle with the intent to do him bodily harm. MERCADO shot the victim four times in the back. The jury returned a verdict of guilty and recommended a life sentence. After the jury's recommendation was made, the State announced that it was not seeking the death penalty.

The Judge ordered a pre-sentence investigation and submitted a written finding of fact that no aggravating circumstances existed. The Judge found the mitigating circumstances that MERCADO had not significant prior criminal history.

#### **DEFENDANT:**

Name: GENTRY, JOHN LEE  
Age: 28 years  
Race: Black  
Crime: First Degree Murder

#### **SOURCE OF INFORMATION:**

Record reviewed at the Fourth District of Appeal.

#### **TRIAL PROCEEDINGS:**

Circuit Court, Palm Beach County

#### **JURY RECOMMENDATION:**

Life

#### **SENTENCE OF COURT:**

Life; Judgment entered October 1, 1974.

#### **APPELLATE PROCEEDINGS:**

District Court of Appeal, Fourth District, Case No. 74-1345

#### **SUMMARY OF THE CASE:**

GENTRY was charged by indictment with first degree murder and assault with intent to commit murder in the second degree. On October 18, GENTRY had a domestic quarrel with his common law wife in their room in Palm Beach County. The victim ran out of their room, into an adjoining room where her mother was seated and jumped into her mother's lap, asking her to protect her from the defendant. The defendant ran into the room brandishing a large butcher knife. Also in the room was one ALEX MONTIS, who stood up and asked the defendant what he was doing, whereupon the defendant cut MONTIS on the head with the butcher knife and declared, "I'm going to kill all three of you." He then stabbed the victim twice in the chest where she sat cuddled in her mother's arms.

The jury returned a verdict of guilty of murder in the first degree.

At the sentencing hearing evidence was presented that the victim had five children that were being cared for by the defendant and herself. The jury recommended life imprisonment.

The Judge ordered a pre-sentence investigation. The defendant was returned to Court on October 1, 1974 where he was adjudged guilty and sentenced to life imprisonment. The Judge filed his detailed written findings of fact in support of his judgment, stating that with regard to F.S. §921.141, and the interpretation of the criteria as set fourth in *State v. Dixon*, 283 So.2d 1 (1973). There were no aggravating circumstances, despite the fact that

"[I]t is indeed difficult to take the position that first degree murder from a premeditated design is not especially heinous, atrocious or cruel when the defendant, after a domestic dispute, takes a butcher knife and chases the woman with whom he has lived into another apartment and plunges the knife into her chest while he threatened to kill the victim. Then he calmly walks from the apartment as if nothing had occurred." [p. 3 of findings]

The Court found the mitigating circumstance of no prior criminal activity of the defendant.

#### COMMENT:

(only?)

This was one of the few cases in which the justification for sentence was imposed could be determined.

#### DEFENDANTS:

Name: JEFFERSON, ARTHUR FILMORE  
JEFFERSON, LARRY  
Age: 32 years (ARTHUR JEFFERSON)  
20 years (LARRY JEFFERSON)  
Race: White (both)  
Crime: First Degree Murder (both)

#### SOURCE OF INFORMATION:

Record reviewed at Fourth District Court of Appeal (ARTHUR JEFFERSON)  
Conference with counsel (LARRY JEFFERSON)

#### TRIAL PROCEEDINGS:

Circuit Court, Brevard County, Case No. 74-477 (tried together)

#### JURY RECOMMENDATION:

Life (for both)

#### SENTENCE OF COURT:

Life; Judgment entered for both on November 18, 1974.

#### APPELLATE PROCEEDINGS:

District Court of Appeal, Fourth District, Case No. 75-252 (ARTHUR JEFFERSON)  
Case not being appealed. (LARRY JEFFERSON)



**SUMMARY OF THE CASE:**

ARTHUR FILMORE JEFFERSON and his brother, LARRY JEFFERSON, were tried in separate trials for the shooting death of a 29 year old white man in Brevard County.

On December 2, 1973, ARTHUR and LARRY and one other male went to the back of the Sizzlin Steak House in Brevard County apparently intending to burglarize it. The victim of this case, the night manager of the Sizzlin Steak House, was coming out the back door with a satchel with the evening receipts in it. There was approximately \$8,000.00 in the satchel at this time. He was confronted in the parking lot by the three defendants; ARTHUR demanded the money. At this point, the victim threw the satchel over the wall and it was alleged that ARTHUR then fired one shot and then, after the victim began to fall backwards, fired two more shots. The victim's wife heard the commotion and the shots and got outside the back door of the Sizzlin Steak House just in time to see her husband staggering towards her. The victim was hospitalized and subsequently died on December 31, 1973. The case took some time to develop, and finally the three alleged culprits were apprehended.

ARTHUR and LARRY vehemently denied any participation in the robbery. The third defendant was granted immunity for his testimony, and it was he who said that ARTHUR fired the fatal shots. It was this third defendant's claim that he and LARRY were along but they had panicked and run after the shooting.

In both cases, the defendants were found guilty of first degree murder with recommendation of life imprisonment. The record indicates that the Judge followed the jury's recommendation of life imprisonment for ARTHUR and sentenced him to life imprisonment despite the fact that it appears that the defendant was under sentence of imprisonment, that the defendant was participating in a robbery, and that the capital felony was committed for pecuniary gain. Moreover, it appears that the defendant had an extensive criminal record with at least ten prior convictions.

Conferences with Counsel for LARRY JEFFERSON indicated that LARRY had a prior record and was under sentence of imprisonment for breaking and entering. By way of mitigation, it appeared that LARRY was an accomplice in the capital felony and that his age was a consideration in the sentence. Conference with counsel indicated that after extensive discussion and negotiation, the defendant was sentenced to life in prison and that the case would not be appealed.

**DEFENDANT**

Name: CALLOWAY, JESSIE WILLIE  
 Age: 26 years  
 Race: Black  
 Crime: First Degree Murder

**SOURCE OF INFORMATION:**

Record reviewed at Fourth District Court of Appeal

**TRIAL PROCEEDINGS:**

Circuit Court, Okeechobee County, Case No. 74-1

**JURY RECOMENDATION:**

Life

**SENTENCE OF COURT:**

Life; Judgment entered April 18, 1974.

**APPELLATE PROCEEDINGS:**

District Court of Appeal, Fourth District, Case No. 74-611

**SUMMARY OF THE CASE:**

JESSIE WILLIE CALLOWAY was indicted for the first degree murder of a five-month-old black baby in Okeechobee County.

On December 29, 1973, the defendant and the victim's mother returned home from an evening of drinking at various bars in Okeechobee. The mother testified that she and CALLOWAY had been living together under a common law set-up with her two children. When they returned home, the mother testified that the defendant grabbed the baby by the chest and, holding it down, began to beat it. She tried to intervene on the baby's behalf and at this point he was quoted as saying "are

you trying to stick up for him" and struck her once on the head knocking her against the wall. At this point he picked up the baby, raised it over his head and threw it to the concrete floor. She then ran out and the defendant caught her and together they went to a bar and summoned assistance.

The defendant contended that when he returned home he heard the baby crying and picked it up in an effort to comfort it. Then as he was tossing the baby up and down in his hands in a bouncing manner, because of his high degree of intoxication he missed the baby and it fell to the floor. It was his contention that the baby was already injured when he returned home and that was the reason it was crying. The jury returned a verdict of guilty of murder in the first degree. The jury then returned a recommendation of life imprisonment.

Immediately upon the return of the advisory verdict the Judge pronounced a sentence of life imprisonment upon the defendant without a written finding of fact. The Judge stated in the record he considered the crime especially heinous, atrocious and cruel as far as aggravating circumstances.

He also pointed out that the defendant had no prior criminal record, and his capacity to appreciate the criminality of his conduct was impaired due to the high degree of intoxication, and also the defendant's age were sufficient to justify an imposition of a life sentence.



**DEFENDANT:**

Name: ZADNICK, RUDOLPH  
 Age: 35 years  
 Race: White  
 Crime: First Degree Murder

**SOURCE OF INFORMATION:**

Record reviewed at Fourth District Court of Appeal.

**TRIAL PROCEEDINGS:**

Circuit Court, Orange County, Case No. 74-1866

**JURY RECOMMENDATION:**

Death

**SENTENCE OF COURT:**

Life; Judgment entered November 27, 1974.

**APPELLATE PROCEEDINGS:**

District Court of Appeal, Fourth District, Case No. 74-1807

**SUMMARY OF THE CASE:**

ZADNICK was charged with the beating and stabbing death of a white female whose age was not determined for the record, and her five year old son.

The defendant had been living with the victim and her son for a short period of time prior to this incident. It appears that in the late evening hours of June 27, 1974 someone beat the mother and her child in the bedroom of their home with a skillet. The mother's body was found on the bed and the child's body was found next to the bed with one leg on the bed. Also found in the room was a broken skillet which apparently had been used to inflict the wounds on the heads of the victims, and a knife which was attributed to the stab wounds that were also found on the two victims.

Earlier that evening one JAMES ATKINS had been with the victim and her son and testimony followed that the defendant arrived after JAMES ATKINS left and was not seen leaving the house later in the evening. The defendant's shirt was found in the bedroom where the bodies were found with blood on it, and a D.W.I. citation in the pocket connected the case to him.

ZADNICK was found guilty of first degree murder by a jury which recommended the death sentence. The Judge, however, overruled the jury's recommendation, stating that the crime was not particularly heinous, atrocious and cruel, ZADNICK had no prior record and that ZADNICK had been drunk. ZADNICK was sentenced to two consecutive live sentences.

**COMMENT:**

The bludgeoning and stabbing death of a mother and young child were determined by the Judge in this case not to be within the meaning of "heinous, atrocious and cruel". The defendant's drinking was mentioned.

**DEFENDANT:**

Name: LEE, DELORES, a/k/a  
BROWN, DELORES  
Age: 21 years  
Race: Black  
Crime:

**SOURCE OF INFORMATION:**

Record reviewed at Fourth District Court of Appeal.

**TRIAL PROCEEDINGS:**

Circuit Court, Orange County, Case No. 74-201

**JURY RECOMMENDATION:**

Life

**SENTENCE OF COURT:**

Life: Judgment entered May 22, 1974.

**APPELLATE PROCEEDINGS:**

District Court of Appeal, Fourth District, Case No. 74-847.

**SUMMARY OF THE CASE:**

DELORES LEE was indicted for first degree murder in the shooting death of a 49-year old white man in Orange County.

On May 28, 1973, the defendant, allegedly a prostitute, got into the victim's car under the guise of setting up a prostitution connection. She directed him to drive to a remote area and enter a vacant lot. At this time, one JACK FLORENCE arrived. FLORENCE apparently got a pistol from the victim's car and shot the victim three times: once in the head, once in the neck and once in the shoulder. FLORENCE took an undetermined amount of money and disappeared. He has not yet been apprehended.

The defendant attempted to establish at the trial that she had no prior knowledge and was not acting as a principal not as an accessory to this offense and that the crime was as big a surprise to her as it was to the victim. The state put on no evidence at the sentencing hearing and the jury recommended a life sentence. The Judge made the simple statement that the aggravating circumstances did not outweigh the mitigating circumstances, and sentenced her to life imprisonment.

**COMMENT:**

Apparent aggravating circumstances were that the murder was committed during a robbery and for pecuniary gain. Apparent mitigating circumstances were that defendant was an accomplice who did not actually commit the murder and that she was only 21 years old.



**DEFENDANT:**

Name: WARE, CHARLIE  
 Age: 24 years  
 Race: Black  
 Crime: First Degree Murder  
 Robbery

**PLEA NEGOTIATIONS:**

WARE pled *nolo contendere* to both counts in the Circuit Court of Orange County, Case No. 73-2157 and 73-2067 in exchange for life imprisonment.

**JURY RECOMMENDATION**

No jury was impaneled for advisory sentence.

**SENTENCE OF THE COURT:**

Life; Judgment entered January 16, 1974.

**APPELLATE PROCEEDINGS:**

District Court of Appeal, Fourth District, Case No. 74-95

**SUMMARY OF THE CASE:**

WARE, a 24 year old black male, was indicted for robbery and murder in the first degree in connection with a shooting death of a 50 year old white male service station attendant.

Apparently, two other individuals were involved. On August 22, 1973, a car with three black males pulled into a service station at the Lakeshore Lodge in Orange County. When they pulled in, the attendant was seated by the front of the establishment. At this time, WARE pulled pistol and shot the attendant where he sat. They then took \$65.00 from a woman who was present at the establishment.

The Judge made no written finding of fact to support the judgment and sentence. It could be gleaned from the record that the aggravating circumstances present would have been the defendant was in the perpetration of a robbery and that it was committed for pecuniary gain. The only mitigating circumstance that can be gleaned from the record would be his age.

**DEFENDANT:**

Name: POWERS, MICHAEL LAWRENCE  
 Age: Not available from Record  
 Race: Black  
 Crime: First Degree Murder and Robbery

**SOURCE OF INFORMATION:**

Record Reviewed at Fourth District Court of Appeals.

**TRIAL PROCEEDINGS:**

Circuit Court, Seminole County, Case No. 73-389

**JURY RECOMMENDATION:**

Life

**SENTENCE OF COURT:**

Life; Judgment entered October 10, 1973.

**APPELLATE PROCEEDINGS:**

District Court of Appeal, Fourth District, Case No. 73-1196

**SUMMARY OF THE CASE:**

POWERS was indicted for the murder in the first degree and robbery in connection with the shooting death of a 50 year old white male.

The case arose in Cape Canaveral in Brevard County, but due to the pretrial publicity, was transferred to Seminole County.

On May 17, 1973, the defendant entered a Minit Mart on Cape Canaveral. He found the elderly proprietor to be the only person present. He made the proprietor move to the rear of the store and forced him to seat himself upon a box. The defendant fired three shots into the victim's head, killing him instantly.

It appears that the defendant made statements to his brother that once he got in the store he was going to kill the old man. Moreover, he made numerous statements to fellow inmates in the County Jail during the pendency of his trial that he intended to and was glad that he had shot the old man.

The jury found POWERS guilty of first degree murder, recommending a life sentence. The Judge followed the jury recommendation.

**COMMENT:**

This brutal premeditated killing was carried out during a robbery. No mitigating circumstances were shown in the record.

**DEFENDANT:**

Name: DEESE, JR., WILLIAM  
Age: 23 years  
Race: White  
Crime: First Degree Murder

**SOURCE OF INFORMATION:**

Record reviewed at Fourth District Court of Appeal

**TRIAL PROCEEDINGS:**

Circuit Court, Palm Beach County, Case No. 73-625

**JURY RECOMMENDATION:**

Life

**SENTENCE OF COURT:**

Life; Judgment entered on January 11, 1974.



**APPELLATE PROCEEDINGS:**

District Court of Appeal, Fourth District, Case No. 74-70

**SUMMARY OF THE CASE:**

DEESE was indicted for murder in the first degree in the death of a white male in Palm Beach County. It appears that on January 29, 1973, the victim, DONALD BELCHER, followed the defendant home and made a proposition to him for homosexual relations. The defendant went with him and got into the victim's car and rode with him to a remote roadside. It was at this remote roadside that the victim's body was found some days later with numerous stab wounds.

The defendant, asserting that all he wanted to do was beat the man up, also presented evidence that the defendant had been drinking for ten to twelve hours and was not in complete comprehension of what he was doing.

However, the facts indicate that the victim was stabbed 22 times in the head and neck, 4 times in the heart, and there were 6 slicing type cut wounds, and 1 cut which the doctor testified was an effort to amputate the victim's genitals. From the doctor's findings, it appears that the genitals were being pulled away from the body at the time that they were cut. The defendant admitted that he wanted to beat up the man because he hated homosexuals, but did not recall the details of the killing himself.

The matter was presented to the jury on July 13, 1973 and they returned a verdict of guilty of murder in the first degree with recommendation of life imprisonment.

DEESE was adjudged guilty of the offense and sentenced to life imprisonment. The Court entered a written finding of facts in support of its sentence. It appears that extensive psychiatric testimony was presented at the trial going to the defendant's state of mind at the time of perpetration of this offense. The Court also had the benefit of a pre-sentence investigation, however, no specific aggravating and mitigating circumstances were set forth in the written findings and all that could be gleaned from the record would have been that of the defendant's age as a mitigating circumstance and that the crime was especially heinous, atrocious or cruel.

**DEFENDANT:**

Name: DIXON, DONALD ALLEN  
Age: 27 years  
Race: White  
Crime: First Degree Murder

**SOURCE OF INFORMATION:**

Record reviewed at First District of Appeal

**TRIAL PROCEEDINGS:**

Circuit Court, Madison County, Case No. 74-63

**JURY RECOMMENDATION:**

Life

**SENTENCE OF COURT:**

Life; Judgment entered on June 21, 1974.

**APPELLATE PROCEEDINGS:**

District Court of Appeal, First District, Case No. W-219

**SUMMARY OF THE CASE:**

DIXON was charged with the first degree murder of his 19 year old wife during a marital argument in Madison County. DIXON said that he and his wife had struggled in the car after having marital problems and that a gun was fired several times during the struggle, one of the bullets entering his wife's brain from the back of the head and one inflicting surface wounds on DIXON. After determining that his wife was dead (about 10 p.m. on December 14, 1972), DIXON drove to Suwannee County and appeared at the County Jail at about 3 a.m. with his wife's body in the car. He admitted the shooting, saying that it had been accidental.

The jury recommended life imprisonment, the only possible aggravating circumstance being the prosecution's contention that the crime was especially heinous, atrocious and cruel. The Judge accepted the jury's recommendation without including a separate finding of fact for the record and sentenced DIXON to life imprisonment.

**DEFENDANT:**

Name: MC MAHON, RAYMOND  
Age: 32 years  
Race: White  
Crime: First Degree Murder

**SOURCE OF INFORMATION:**

Conference with defense counsel

**PLEA NEGOTIATIONS:**

MC MAHON pled guilty to two counts of first degree murder and was sentenced to two concurrent life sentences in the Circuit Court of Hillsborough County, Case No.

**SENTENCE OF COURT:**

Life; Judgment entered

**APPELLATE PROCEEDINGS:****SUMMARY OF THE CASE:**

MC MAHON was indicted for the first degree murder of two young white girls, ages 5 and 13, in Tampa, Florida.

MC MAHON was driving at dusk in a residential neighborhood of Tampa and circled the block two or three times. The girls were walking with their brother on the opposite side the street, off the roadway. MC MAHON swerved his car and ran over the three,



stopped the car quickly, threw the older girl in the car, and sped off. The 5 year old died two days later. The body of the 13 year old was found 2 days later after the incident along the side of the road some distance from the scene. Her panties were off but there was no physical evidence of sexual molestation. The evidence was that she had died within 15 minutes after being hit by the car. MC MAHON turned himself in to law enforcement officers 10 days later in Baxley, Georgia. MC MAHON did not know the victims. There was evidence that he and his wife had been arguing furiously immediately before the incident.

The Court made no finding of facts concerning aggravating and mitigating circumstances.

#### **DEFENDANT:**

Name: ADAMS, JAMES  
Age: Not available from record  
Race:  
Crime: First Degree Murder

#### **SOURCE OF INFORMATION:**

Record reviewed at Supreme Court.

#### **TRIAL PROCEEDINGS:**

Circuit Court, St. Lucie County, Case No.

#### **JURY RECOMMENDATION:**

Death

#### **SENTENCE OF COURT:**

Death; Judgment Entered on March 19, 1974.

#### **APPELLATE PROCEEDINGS:**

Supreme Court, Case No. 5,450

#### **SUMMARY OF THE CASE:**

#### **DEFENDANT:**

Name: ALVORD, GARY  
Age: 26  
Race: White  
Crime: First Degree Murder (3 victims)

#### **SOURCE OF INFORMATION:**

Record reviewed at Supreme Court.

#### **TRIAL PROCEEDINGS:**

Circuit Court, Hillsborough County, Case No.

#### **JURY RECOMMENDATION:**

Death

#### **SENTENCE OF COURT:**

Death

**APPELLATE PROCEEDINGS:**

Supreme Court, Case No.

**SUMMARY OF THE CASE:**

ALVORD was indicted for the first degree murder of 3 white women in Tampa.

The bodies of three women were discovered in the Tampa home of ANN HERMANN, 36, one of the victims. The other victims were GEORGIA TULLY, MRS. HERMAN'S mother and LYNN HERMANN, the 18 year old daughter of MRS. HERMANN. The victims were found in separate rooms of the house strangled with a piece of cord. A vaginal test of LYNN HERMANN showed the presence of semen, although there was no evidence that the semen was the defendant's. The front door of the house had been kicked open and the condition of the house indicated that the murderer had burglarized the house.

ALVORD had been confined to mental institutions intermittently since age 13, and had recently escaped from a Michigan Mental Hospital. He was in the hospital as a result of being found not guilty of rape by reason of insanity (not a M'naughten state). ALVORD had stated a month before the slaying that he disliked ANN HERMANN and could or would choke her. There was testimony that ALVORD had some of ANN HERMAN'S jewelry in his possession after the date of the murders. A cord similar to the murder cord was found in ALVORD'S apartment, and his girlfriend testified that he told her "I had to rub out 3 people last night"—"ANN, LYNN and her mom." He had

further stated that he had gone to the house to kill them and had gotten in the house by kicking the door in.

A plea of not guilty was entered. Following trial, the jury returned a verdict of guilty and recommended the death penalty. The Court made a separate finding of fact as to the following aggravating and mitigating circumstances:

Aggravating: (A) There was a premeditated design to commit the capital felony while engaged in the commission of a burglary; (B) At the time the capital felony was committed, two other capital felonies (murder) took place; (C) The murders were especially heinous, atrocious and cruel; (D) The defendant knowingly created a great risk of serious bodily harm and death to many persons.

ALVORD also had a significant criminal record.

Upon this finding of fact, the Court sentenced ALVORD to death.

Mitigating circumstances the Court found were that ALVORD was under the influence of extreme mental disturbance, and his capacity to conform his conduct to the requirements of the law was impaired.

**DEFENDANT:**

Name: MOORE, JACOB  
Age: Not available from Record  
Race: Black  
Crime: First Degree Murder



**SOURCE OF INFORMATION:**

Record reviewed at Second District Court of Appeal

**TRIAL PROCEEDINGS:**

Circuit Court, Sarasota County, Case No.

**JURY RECOMMENDATION:****SENTENCE OF COURT:**

Life;

**APPELLATE PROCEEDINGS:**

District Court of Appeal, Second District, Case No.  
74-496

**SUMMARY OF THE CASE:**

MOORE was indicted for the first degree murder of a 74 year old white man who was a security guard at New College in Sarasota.

MOORE had been on and around the New College campus from early in the afternoon until 12:00 a.m. During this time, he had been drinking wine with some of the students, and asking everyone he met if they knew where "Tony from Gainesville" was. He was ejected from several dormitory rooms which he had entered without permission. He entered a coed's room and awaken her with his hands around her neck, attempting to kiss her. She ran from her room and he

gave chase. The victim, a security guard armed with a holstered pistol, attempted to restrain MOORE, who thereupon took the victim's gun away, shot and killed him.

A plea of not guilty was entered. Following trial, the jury returned a verdict of guilty. The Court made no separate findings of fact and sentenced the defendant to life imprisonment. The transcript of the sentencing hearing was not included in the record.

**DEFENDANT:**

Name: THOMPSON, LARRY, a/k/a  
MACK ANTHONY LEWIS  
Age: 17 years  
Race: Not available from Record  
Crime: First Degree Murder

**SOURCE OF INFORMATION:**

Record reviewed at Supreme Court.

**TRIAL PROCEEDINGS:**

Circuit Court, Orange County, Case No.

**JURY RECOMMENDATION:**

Life (unanimous)

**SENTENCE OF COURT:**

Death; Judgment entered on January 1, 1974.

**APPELLATE PROCEEDINGS:**

Supreme Court, Case No. 45,107

**SUMMARY OF THE CASE:**

THOMPSON was indicted by an Orange County Grand Jury for the first degree murder of a     year old white male on October 4, 1973.

THOMPSON and an accomplice armed with a knife, robbed a Royal Castle restaurant. They grabbed the money from the cash register and fled. The victim pursued them and caught up with THOMPSON in the parking lot. THOMPSON grabbed the knife and stabbed the victim 3 times, twice in the chest and once in the back.

THOMPSON entered a plea of not guilty and following the verdict of guilty, the jury unanimously recommended life imprisonment. The Court made no separate finding of fact and sentenced the defendant to death.

The aggravating circumstances present in the record: (A) it was committed for pecuniary gain; (B) the capital felony was committed while fleeing from a robbery; and (C) was especially heinous, atrocious and cruel. The mitigating circumstances gleaned were that THOMPSON had no significant prior criminal activity, crime was committed under extreme duress and the defendant's age being 17 years.

**DEFENDANT:**

Name: BURCH, JACKSON B.  
Age: 23 years  
Race: Black  
Crime: First Degree Murder

**SOURCE OF INFORMATION:**

Record reviewed at Supreme Court.

**TRIAL PROCEEDINGS:**

Circuit Court, Palm Beach County, Case No.

**JURY RECOMMENDATION:**

Life

**SENTENCE OF COURT:**

Death, Judgment entered March 29, 1974.

**APPELLATE PROCEEDINGS:**

Supreme Court, Case No. 45,359

**SUMMARY OF THE CASE:**

BURCH was indicted by a Palm Beach County Grand Jury for the first degree murder of PAMELA CURRY, a white girl on April 10, 1973.

BURCH, a gardner at a house on Palm Beach, saw the victim walking alone on the beach. He accosted her at knifepoint and forced her to go to a small pumphouse



on the beach. He attempted to rape her, however, he prematurely ejaculated and was unable to achieve penetration. He kept trying to maintain an erection to no avail. The victim refused to lie still and began struggling to free herself, whereupon BURCH stabbed her 36 times with his knife. He then buried her under the floorboards of the pumphouse. He was arrested two days later.

The defendant entered a plea of not guilty (by reason of insanity). The jury returned a verdict of guilty and recommended life imprisonment. The Court made a separate find of fact and sentenced the defendant to death. The aggravating circumstances the Court found were that (1) the capital felony was committed while attempting to rape and (2) the crime was especially heinous, atrocious and cruel. The mitigating circumstances found were that (2) BURCH had no significant prior criminal activity, and (2) that he had an impaired capacity to appreciate the criminality of his conduct or to conform to the requirements of the law.

#### **DEFENDANT:**

Name: TICE, JOHN HENRY  
Age: 43 years  
Race: Black  
Crime: First Degree Murder

#### **SOURCE OF INFORMATION:**

Record reviewed at Second District Court of Appeal.

#### **TRIAL PROCEEDINGS:**

Circuit Court, DeSoto County, Case No.

#### **JURY RECOMMENDATION:**

TICE waived his right to an advisory sentence.

#### **SENTENCE OF COURT:**

Life; Judgment entered August 26, 1974

#### **APPELLATE PROCEEDINGS:**

District Court of Appeal, Second District, Case No. 74-1134

#### **SUMMARY OF THE CASE:**

TICE was indicated by a DeSoto County Grand Jury for the first degree murder of his girlfriend.

In the early evening, the defendant and the victim talked by phone. The victim stated that she wanted to break off their relationship. The defendant came to her home to talk further about the matter. During their conversation, the defendant shot the victim with a .25 caliber pistol which he was carrying. There was testimony that the defendant had been drinking although not enough to be considered legally intoxicated.

A plea of not guilty was entered. The jury returned a verdict of guilty. The defendant waived his right to a jury recommendation on sentencing.

The Court made no finding of fact as aggravating and/or mitigating circumstances and sentenced the defendant to life. There was no mention in the sentence of 25 years without any possibility of parole.

**DEFENDANT:**

Name: GARMISE, LLOYD  
 Age: 21 years  
 Race: White  
 Crime: First Degree Murder

**SOURCE OF INFORMATION:**

Record reviewed at Third District Court of Appeal

**TRIAL PROCEEDINGS:**

Circuit Court, Dade County, Case No.

**JURY RECOMMENDATION:**

Life

**SENTENCE OF COURT:**

Life; Judgment entered May 4, 1974

**APPELLATE PROCEEDINGS:**

Third District Court of Appeal, Case No. 74-1134

**SUMMARY OF THE CASE:**

GARMISE was indicted by a Dade County Grand Jury for first degree murder of his college roommate.

GARMISE and the victim, college students, shared a house with two other people. They had a history of arguments. GARMISE stated that on May 16, 1973, the victim became angry at him over a dirty plate, and

came after him in his small bedroom with a butcher knife. GARMISE grabbed a loaded pistol kept near his bed and shot the victim. The State contended the victim's three gunshot wounds, two in front and one in back, were inflicted by GARMISE to carry out his well-planned murder of the victim.

The jury returned a verdict of guilty and recommended a life sentence. GARMISE received a life sentence.

From the record, it would appear that the only aggravating circumstance which existed was that the crime was especially heinous, atrocious, or cruel. The State supported this by arguing the age of the victim and the fact he was shot in the back. It would further appear that the only mitigating circumstance which existed was the defendant's age.

**DEFENDANT:**

Name: PALMER, ANGELO  
 Age: 54 years  
 Race: Black  
 Crime: First Degree Murder

**SOURCE OF INFORMATION:**

Record reviewed at Second District Court of Appeal.

**TRIAL PROCEEDINGS:**

Circuit Court, Hillsborough County, Case No.

**JURY RECOMMENDATION:**

Life.



**SENTENCE OF COURT:**

Life; Judgment entered on

**APPELLATE PROCEEDINGS:**

Second District Court of Appeal, Case No. 73-892

**SUMMARY OF THE CASE:****DEFENDANT:**

Name: ELLEY, Jim E.  
 Age: 24 years  
 Race: White  
 Crime: First Degree Murder

**SOURCE OF INFORMATION:**

Record reviewed at Second District Court of Appeal

**PLEA NEGOTIATIONS:**

ELLEY pled guilty to first degree murder in exchange for life sentence. No jury was impaneled for sentencing, Circuit Court, Pinellas County, Case No. 74-801.

**SENTENCE OF COURT:**

Life; Judgment entered June 24, 1974.

**APPELLATE PROCEEDINGS:**

Second District Court of Appeal, Case No.

**SUMMARY OF THE CASE:**

ELLEY was indicted for the first degree murder of an elderly white woman in St. Petersburg, Florida.

The defendant and two other men accosted an elderly white woman in St. Petersburg, and forced her to get into ELLEY'S car. The four then drove to an isolated area, robbed the victim of her jewelry and money, then strangled and beat her to death.

The Court made no finding of fact as to aggravating and mitigating circumstances.

**DEFENDANT:**

Name: JOLLY, HORACE N.  
 Age: Not available from Record  
 Race: Black  
 Crime: First Degree Murder

**SOURCE OF INFORMATION:**

Record reviewed at Second District Court of Appeal

**TRIAL PROCEEDINGS:**

Circuit Court, Hillsborough County, Case No.

**JURY RECOMMENDATION:**

Life

**SENTENCE OF COURT:**

Life; Judgment entered June 4, 1974.

**APPELLATE PROCEEDINGS:**

Second District Court of Appeal, Case No. 74-756

**SUMMARY OF THE CASE:**

JOLLY was indicted for the first degree murder of a Greek immigrant taxi driver in Tampa.

JOLLY was a passenger in the victim's cab at approximately 10:45 p.m. When the driver arrived at the destination, JOLLY, seated in the rear seat, drew a pistol and demanded the driver's money. JOLLY then shot the driver in the head, grabbed the money and ran.

A plea of not guilty was entered. The jury returned a verdict of guilty and recommended a life sentence. The Court made no separate finding of fact as to aggravating and mitigating circumstances and sentenced the defendant to life in prison (without mention of the twenty-five year minimum sentence).

The record indicates that the murder was committed during a robbery for pecuniary gain. The State also contended that the murder was especially heinous, atrocious and cruel. No mitigating circumstances were apparent.

**DEFENDANT:**

Name: BURT, JAMES  
Age: 49  
Race: Black  
Crime: First Degree Murder

**SOURCE OF INFORMATION:**

Record reviewed at Second District Court of Appeal

**TRIAL PROCEEDINGS:**

Circuit Court, Polk County, Case No.

**JURY RECOMMENDATION:**

No advisory sentence given. The State was not seeking the death penalty.

**SENTENCE OF COURT:**

Life; Judgment entered May 7, 1974.

**APPELLATE PROCEEDINGS:**

Second District Court of Appeal, Case No.  
Affirmed in *per curiam* decision, December 3, 1974.

**SUMMARY OF THE CASE:**

BURT was indicted for the first degree murder of a 36 year old black male in Polk County. The victim was at the home of BURT'S former girlfriend at about 2:00 a.m. BURT came to the house where the victim and the woman were watching television, and he was admitted into the house. He went to the bathroom while the victim and the woman continued to watch television for about 15 minutes. BURT came back into the living room and shot the victim with a pistol; the victim managed to get from the house out to the street where he fell. BURT got in his car and ran over the victim several times with his car, then drove off.

A plea of not guilty was entered. The jury returned a verdict of guilty. The State did not seek the death penalty, and no sentencing trial was held. BURT was sentenced to life in prison.



**COMMENT:**

The Court apparently considered that evidence of BURT'S somewhat retarded mental condition sufficiently overcame the cruelty of this matter.

**DEFENDANT:**

Name: MATHIS, HERBERT LEE  
 Age: Not available from Record  
 Race: Black  
 Crime: First Degree Murder

**SOURCE OF INFORMATION:**

Record reviewed at Second District Court of Appeal

**TRIAL PROCEEDINGS:**

Circuit Court, Sarasota County, Case No.

**JURY RECOMMENDATION:**

Life

**SENTENCE OF COURT:**

Life; Judgment entered on October 18, 1974.

**APPELLATE PROCEEDINGS:**

Second District Court of Appeal, Case No. 74-1288

**SUMMARY OF THE CASE:**

MATHIS was indicted for the first degree murder of a white man in his late twenties.

The victim, married and the father of a child, had gone to a "Black" night club in Sarasota seeking to engage a Black prostitute for the evening. He made a bargain for \$15 with an attractive "lady" who was, in fact, a female impersonator. They left the club and went to the victim's car in the parking lot. As they got into the car, a young Black man (an accomplice of the defendant) slid into the front seat beside the victim's date and demanded that the victim hand over his wallet. As the victim turned to speak to the accomplice, MATHIS, who was standing next to the driver's window, shot the victim with a pistol.

No transcript of the sentencing hearing was available, but it appears from the record that the State waived the death penalty.

**DEFENDANT:**

Name: DETTMER, TERRY  
 Age: 20 years  
 Race: White  
 Crime: First Degree Murder

**SOURCE OF INFORMATION:**

Record reviewed at Second District Court of Appeal

**TRIAL PROCEEDINGS:**

Circuit Court, Hillsborough County, Case No.

**JURY RECOMMENDATION:**

Life

**SENTENCE OF COURT:**

Life;

**APPELLATE PROCEEDINGS:**

District Court of Appeal, Second District, Case No.  
Affirmed in *per curiam* decision, November 27, 1974.

**SUMMARY OF THE CASE:**

DETTMER went to the home of the victim, a 25-year old woman, in the late evening and was apparently admitted to the house. The victim was stabbed repeatedly in the chest and back. Her cries awakened her 4 year old son, who ran into the living room where the attack was taking place and tried to stop the attack. He victim managed to make her way from the house to the sidewalk, where she expired from loss of blood. The defendant was seen by a witness a few minutes after the attack, and, when asked about the great amounts of blood on his slacks, he replied "Oh, I killed her, didn't you know."

A plea of not guilty was entered. The jury returned a verdict of guilty, and recommended a life sentence. The Court made no separate finding of fact as to aggravating and mitigating circumstances, and sentenced the defendant to life.

The aggravating circumstances advanced by the State during the sentencing trial were (1) that the defendant knowingly created a great risk of serious bodily harm or death to many persons—the victim's 4 year old son; (2) that the crime was especially heinous, atrocious and cruel. The mitigating circumstance advanced was that the defendant's mental condition was such that he could not appreciate the criminality of his act or conform his conduct to the law.

**COMMENT:**

Brutal planned stabbing death.

**DEFENDANT:**

Name: PHILLIPS, JACK DEMPSEY  
Age: 42  
Race: White  
Crime: First Degree Murder and  
Assault with Intent to  
Commit First Degree Murder

**SOURCE OF INFORMATION:**

Record reviewed at Dade County Circuit Court and Third District Court of Appeal.

**TRIAL PROCEEDINGS:**

Circuit Court, Dade County, Case No. 73-468

**JURY RECOMMENDATION:**

The jury proceeding for sentencing was waived when the Judge advised attorneys that he intended to sentence the Defendant to life.



**SENTENCE OF COURT:**

Life, Judgment entered September 28, 1973.

**APPELLATE PROCEEDINGS:**

District Court of Appeal, Third District, Case No. 74-1432

**SUMMARY OF THE CASE:**

PHILLIPS was indicted by a Dade County Grand Jury for the first degree murder of a 42 year old white male, and Assault with intent to commit First Degree Murder of his ex-wife (the victim's girlfriend).

PHILLIPS had divorced his wife in 1971, and constant hostility had existed between them since that time. The ex-wife, the victim (her boyfriend), and the ex-wife's daughter were seated at the kitchen table of the ex-wife's home. Defendant fired a shot through the window of the home, hitting the victim in the head and killing him. The daughter ran to the neighbor's for help. Defendant entered the house. His ex-wife got a gun and hid in the bedroom. The defendant found his ex-wife and fired at her, hitting her and causing her to fall. The ex-wife related that she pretended to be dead, at which point the defendant bent over her and said, "You motherfucking son of a bitch, are you dead?" On the way out he leaned over the victim and said, "you fucking son of a bitch, are you dead too?" The defendant then went to his apartment, told his neighbor he had just shot two people, and left the area.

A plea of not guilty was entered, and following the trial, a jury brought a verdict of guilty. The defendant waived a second jury for sentencing as the judge advised the attorneys he intended to sentence the defendant to life imprisonment.

The Judge made no separate findings of fact, and on May 24, 1974, he sentenced the defendant to life imprisonment.

Based on the foregoing facts it would appear that the only aggravating circumstance which existed was that the murder was especially heinous, atrocious, or cruel.

It would further appear no mitigating circumstances existed.

**DEFENDANT:**

Name: STONE, TROY  
Age: 32 years  
Race: White  
Crime: First Degree Murder

**SOURCE OF INFORMATION:**

Record reviewed at Second District Court of Appeal

**PLEA NEGOTIATIONS:**

Defendant pled guilty to first degree murder in exchange for life sentence in the Circuit Court, Polk County, Case No.

**SENTENCE OF COURT:**

Life; Judgment entered

**APPELLATE PROCEEDINGS:**

District Court of Appeal, Second District, Case No. 74-159.

**SUMMARY OF THE CASE:**

STONE and his brother were in a bar near Fort Mead when a fight occurred between the STONES and several other patrons of the bar. After the fight, STONE drove to Wauchula, 8 miles away, and returned with his rifle to the bar where he waited outside in the parking lot. When several of the men with whom he had been fighting emerged from the bar, STONE called to the victim. The victim walked toward STONE, who shot him.

The Court made no separate findings of fact as to aggravating and mitigating circumstances.

**DEFENDANT:**

Name: PROFFITT, CHARLES WM.  
Age: 28 years  
Race: White  
Crime: First Degree Murder

**SOURCE OF INFORMATION:**

Record reviewed at Supreme Court

**TRIAL PROCEEDINGS:**

Circuit Court, Hillsborough County, Case No.

**JURY RECOMMENDATION:**

Death

**SENTENCE OF COURT:**

Death; Judgment entered March 21, 1974

**APPELLATE PROCEEDINGS:**

Supreme Court, Case No. 45,541

**SUMMARY OF THE CASE:**

PROFFITT was charged with first degree murder for stabbing the victim with a knife. He broke into victim's dwelling house at night. The victim's wife testified that she awoke to a groan only to find her husband draped in a pool of blood. A knife penetrating his stomach. She testified that a man jumped up in front of her and struck her three times in the face (the blows caused no substantial harm.) PROFFITT'S fingerprints could not be matched to fingerprints that were taken in the house.

There was evidence that PROFFITT had been drinking heavily the night of the murder.

A plea of not guilty was entered. Following trial, the jury returned a verdict of guilty and recommended the death penalty. The Court made a separate finding of



fact as to the following aggravating circumstances: (1) PROFFITT had knowingly created a great risk of death to many persons; (2) PROFFITT had been previously convicted of a burglary involving use or threat of violence to the person; (3) PROFFITT had committed burglary in perpetration of the murder; (4) The crime was especially heinous, atrocious or cruel and (5) PROFFITT had a premeditated design to commit murder.

NOTE: The trial and sentencing judge was the Honorable Walter N. Burnside, Jr., Circuit Judge.

#### DEFENDANT:

Name: HALLIWELL, THOMAS A.  
Age: 28 years  
Race: White  
Crime: First Degree Murder

#### SOURCE OF INFORMATION:

Record reviewed at Supreme Court.

#### TRIAL PROCEEDINGS:

Circuit Court, Hillsborough County, Case No. 74-286

#### JURY RECOMMENDATION:

Death

#### SENTENCE OF COURT:

Death; Judgment entered on May 3, 1974.

#### APPELLATE PROCEEDINGS:

Supreme Court, Case No. 45,885

#### SUMMARY OF THE CASE:

HALLIWELL had been dating the wife of ARNOLD TRESCH (white and in his twenties) for some time. TRESCH came to the HALLIWELL'S scuba shop and an argument over MRS. TRESCH ensued. HALLIWELL struck TRESCH about the head with a heavy metal bar. He kept his shop open until the end of the day, then cut the victim's body into four quarters, using a machete, handsaw and knife, placed it in a trunk and dumped it in a creek.

HALLIWELL pled not guilty and the jury returned a verdict of guilty with a recommendation of death. The Court imposed the death penalty and made a separate finding of fact as to aggravating and mitigating circumstances. Aggravating circumstances found by the Court were that (1) HALLIWELL using unrestrained violence, murdered the victim from a premeditated design; (2) the murder was committed in a public place and created a great risk of serious bodily harm and death to many persons; (3) the murder was a compound of cruelty, brutality and meanness, and especially heinous, atrocious, cruel and grotesque murder and post mortem desecration. As to mitigating circumstances, the Court found only that HALLIWELL had no significant history of prior criminal activity. The Court considered HALLIWELL would continue to be a menace to society.

**DEFENDANT:**

Name: DOUGLAS, HOWARD VIRGIL LEE  
 Age: 37 years  
 Race:  
 Crime: First Degree Murder

**SOURCE OF INFORMATION:**

Record Reviewed at Supreme Court.

**TRIAL PROCEEDINGS:**

Circuit Court, Polk County, Case No.

**JURY RECOMMENDATION:**

Life (unanimous)

**SENTENCE OF COURT:**

Death; Judgment entered December 4, 1973.

**APPELLATE PROCEEDINGS:**

Supreme Court, Case No. 44,864

**SUMMARY OF THE CASE:**

DOUGLAS was indicted by a Polk County Grand Jury for the first degree murder of JAMES WILLIAMS ATKINS, JR., age 20, on January 17, 1973.

DOUGLAS forced, at gun point, MR. and MRS. ATKINS to drive to a remote wooded area of Polk

County, to disrobe and have sexual relations on the ground before him in the lights of the car; he then forced the ATKINS each to perform an unnatural sex act upon the other. DOUGLAS then clubbed MR. ATKINS 3 times in the head, killing him in the presence of MRS. ATKINS. He then raped MRS. ATKINS and forced her to perform an unnatural sex act on him.

DOUGLAS pled not guilty. The jury found DOUGLAS guilty and recommended life imprisonment. The Court sentenced the defendant to death and made a separate finding of fact.

The aggravating circumstances found by the court were (1) the capital felony was especially heinous, atrocious and cruel; (2) DOUGLAS was 37 years old and had a record of convictions for grand larceny, breaking and entering twice, forgery, escape three times, an undesirable discharge from the Army; and numerous misdemeanors including assault and battery, and contributing to the delinquency of a minor. The defendant's penitentiary sentences aggregated 17 years. The defense offered no mitigating circumstances and the Court found none in imposing the death sentence.

**DEFENDANT:**

Name: JONES, JIMMY LEE  
 Age: 40 years  
 Race: Black  
 Crime: First Degree Murder

**SOURCE OF INFORMATION:**

Record reviewed at Supreme Court



**TRIAL PROCEEDINGS:**

Circuit Court, Pasco County, Case No.

**JURY RECOMMENDATION:**

Life (unanimous)

**SENTENCE OF COURT:**

Death; Judgment entered September 28, 197

**APPELLATE PROCEEDINGS:**

Supreme Court, Case No. 44,669

**SUMMARY OF THE CASE:**

JONES was convicted of the rape-murder of a woman in her thirties. JONES forcible broke into the victim's home where a violent struggle took place. The victim, besides being raped, suffered 38 deep cuts from a knife and numerous other scratches and abrasions. JONES cut his hand in gaining entry, and a trail of blood led from the scene to within 50 feet of his residence. He was arrested 10 days later in Pennsylvania. The Jury unanimously recommended life imprisonment but the Judge sentenced JONES to death.

Although the Judge made no findings of fact, the record indicates the following aggravating factors: (1) JONES had a previous conviction of a felony involving use of threat to violence to a person; (2) murder was committed in connection with a rape and burglary; (3) JONES avoided arrest by fleeing to Pennsylvania; and (4) the crime was especially heinous, atrocious and cruel.

The only mitigating factors appearing from the record was JONES' mental state. JONES' wife testified that JONES felt he was being pursued and persecuted. JONES did not meet the McNaughten test according to the testimony of two psychiatrists.

**DEFENDANT:**

Name: DARDEN, WILLIE JASPER  
Age: 40 years  
Race: Black  
Crime: First Degree Murder

**SOURCE OF INFORMATION:**

Record reviewed at Supreme Court

**TRIAL PROCEEDINGS:**

Circuit Court, Citrus County, Case No.

**JURY RECOMMENDATION:**

Death

**SENTENCE OF COURT:**

Death; Judgment entered on January 23, 1974.

**APPELLATE PROCEEDINGS:**

Supreme Court, Case No. 45,056 and 45,108

**SUMMARY OF THE CASE:**

DARDEN was on furlough from a Florida State Prison facility at the time of the crime. The murder occurred

as DARDEN was committing a robbery in the furniture store run by the victim and his wife. The victim's wife was held at gunpoint during the robbery. The victim was shot as he entered the back door of the store. DARDEN unsuccessfully tried to force the victim's wife to perform fellatio on him. DARDEN was also charged with assault with the intent to murder in connection with this crime. A neighbor boy who came to aid the victim was shot 3 times. DARDEN fled the scene and was involved in a one car accident and left the scene of the accident to be apprehended at his girlfriend's house. DARDEN was indicted by a Polk County Grand Jury, but the trial was moved to Citrus County where the jury recommended death.

The Judge found the following aggravating factors: (1) DARDEN was under sentence of imprisonment at the time of the crime, but by his participation in furlough program, he was out of prison on the weekend. (2) DARDEN had 2 prior convictions for unnamed crimes in the last 10 years; (3) Murder was committed in connection with an armed robbery, and a demand for an unnatural sex act; (4) the victims were innocent law abiding citizens; (5) and assault with intent to murder followed robbery and murder; and (6) the act was especially heinous, atrocious and cruel.

DARDEN'S good prison record was evidenced by his participation in furlough program was the only mitigating factor shown by the record.

## DEFENDANTS:

Name: TILLMAN, GARY H.  
WITT, JOHNNY PAUL  
Ages: TILLMAN: 20 years  
WITT: 31 years  
Race: White  
Crime: First Degree Murder

## SOURCE OF INFORMATION:

TILLMAN: Record reviewed at Second District Court of Appeal

WITT: Record reviewed at Supreme Court

## PLEA NEGOTIATIONS:

TILLMAN pled guilty of first degree murder in exchange for life sentence. There was no jury proceeding to recommend sentence.  
Circuit Court, Hillsborough County, Case No. 73-2181.

## TRIAL PROCEEDINGS:

WITT: Circuit Court, Volusia County, Case No. 74-181

## JURY RECOMMENDATION:

WITT: Death

## SENTENCE OF COURT:

TILLMAN: Life, Judgment entered  
WITT: Death; Judgment entered



**APPELLATE PROCEEDINGS:**

**TILLMAN:** District Court of Appeal, Second District, Case No. 74-646 (There is also a collateral pending at Supreme Court)

**WITT:** Supreme Court, Case No. 45,796.

**SUMMARY OF THE CASE:**

**TILLMAN** and **WITT** were indicted by a Hillsborough County Grand Jury for the first degree murder of **JONATHON KUSHNER**, an 11 year old white boy on October 20, 1973 in Tampa.

**TILLMAN** and **WITT** had stalked people, hunting with bow and arrow, several times before this crime. The victim was riding his bicycle to a neighborhood convenience store at 12:30 p.m. when he was abducted by the defendants. They took him to an orange grove two miles away. The defendant sexually molested the boy, beat him repeatedly with a heavy metal star drill, cut open his stomach in "field dress" style, dismembered his body, and buried him in a shallow grave. A portion of the body was taken to Homosassa, 80 miles away. **WITT** cut off the boy's penis, placed it in a glass bottle filled with formaldehyde, took the bottle to his home and placed it in his medicine cabinet. **WITT'S** wife called the police some days later and based on this tip, **TILLMAN** was arrested. **TILLMAN** then took the police to the grave site.

A severance was granted.

As a result of plea negotiations, **TILLMAN** pled guilty to first degree murder and was sentenced to life

imprisonment. The Judge made no findings of fact, but aggravating circumstances from the record are (1) the capital crime was committed while committing rape and kidnapping, (2) the crime was especially heinous, atrocious, and cruel.

The only mitigating circumstance was **TILLMAN'S** age (20 years) and an impaired capacity to conform his conduct to the requirements of the law.

**WITT** was tried in Volusia County, found guilty with a jury recommendation of death. The Judge found that the murder was committed during a kidnapping, that it was especially heinous, atrocious and cruel and that **WITT'S** actions had created risk of death and harm to many persons and that indeed, **WITT'S** continued existence presented a great risk of death to many persons. In addition, **WITT** had been convicted of two previous felonies. The Judge found that the only mitigating circumstance was **WITT'S** age, and concluded that he is a menace to society without promise of rehabilitation.

**DEFENDANT:**

Name: **TEDDER, MACK REED II**  
 Age: 20 years  
 Race: White  
 Crime: First Degree Murder

**SOURCE OF INFORMATION:**

Record reviewed at Supreme Court

**TRIAL PROCEEDINGS:**

Circuit Court, Hernando County, Case No.

**JURY RECOMMENDATION:**

Life

**SENTENCE OF COURT:**

Death; Judgment entered on August 20, 1974.

**APPELLATE PROCEEDINGS:**

Supreme Court, Case No. 46, 267

**SUMMARY OF THE CASE:**

TEDDER went to his mother-in-law's mobile home where his estranged wife and infant child were living. The three were in the yard as TEDDER approached. He fired some shots with a pistol in the direction of the three, and the mother-in-law told her daughter to run into the house and get her father's shotgun. She ran with her child into the bedroom and unsuccessfully attempted to load the gun. TEDDER pursued the mother-in-law into the house and shot her. He opened the door to the bedroom and forced his wife and child to go with him in his car to Bradenton to his father's farm. The mother-in-law was found some hours later, and she died in the hospital.

A plea not guilty was entered. Following trial, the jury returned a verdict of guilty and recommended a life sentence.

The Court made a separate finding of fact as to the following aggravating and mitigating circumstances. The aggravating circumstances were (1) the defendant

knowingly created a great risk of death to many persons, his wife, his infant child and the victim; (2) the capital felony was committed while he was engaged in the commission of the kidnapping of his wife, all testimony reflecting that he also forceably took his wife from her domicile in Masaryktown to Bradenton, Florida, and held her against her will until she was rescued by the Sheriff's Department of Bradenton; (3) the victim died as a result of especially heinous, atrocious, and cruel acts by the defendant, in that after he shot the victim, he (a) refused to permit his wife to assist her mother, (b) refused to assist the victim, (c) left the victim in such condition that she was unable to obtain assistance for herself.

In the sentencing trial, the defense advanced as mitigation, the defendant's age, 20, and that the defendant was under the influence of extreme mental or emotional disturbance as he was going through a divorce.

Upon this finding of fact, the court sentenced the defendant to death.

**DEFENDANT:**

Name: HALLMAN, CLIFFORD  
Age: 23 years  
Race: White  
Crime: First Degree Murder

**SOURCE OF INFORMATION:**

Record reviewed at Supreme Court



**TRIAL PROCEEDINGS:**

Circuit Court, Hillsborough County, Case No.

**JURY RECOMMENDATION:**

Death

**SENTENCE OF COURT:**

Death; Judgment entered on August 12, 1973.

**APPELLATE PROCEEDINGS:**

Supreme Court, Case No. 44,579

Affirmed in *per curiam* opinion, December, 1974.

**SUMMARY OF THE CASE:**

The incident occurred between 2:00 p.m. and 4:00 p.m. on April 4, 1973, while HALLMAN and the victim (the barmaid, a young white woman) were alone in a bar. HALLMAN cut the barmaid on the neck with a piece of broken glass and stole \$34.40 from the cash register. The victim died four days later of brain stem necrosis caused by the lacerations on her neck. A witness, a barmaid in a nearby bar, ran to the scene in response to a call and testified that the victim stated "CLIFFORD cut me for money." The same witness testified that she saw HALLMAN enter the bar about 2:00 p.m. and leave about 3:45 p.m. with blood smeared on his hands.

A plea of not guilty was entered. The Jury returned a verdict of guilty and recommended death. The Court

made a separate finding of fact and sentenced the defendant to death. In its finding of fact, the trial Court concluded that the following aggravating circumstances were applicable that the crime was committed for pecuniary gain, that the crime was especially heinous, atrocious, or cruel, that the homicide occurred while HALLMAN was engaged in the commission of a robbery, and that HALLMAN had previously been convicted of assault and battery and breaking and entering an automobile with intent to commit assault and battery. The Court considered HALLMAN'S age, 23, to be a mitigating circumstance. Two psychiatrists testified that HALLMAN suffered from a character behavioral disorder, that he was a sociopath and that he was a mentally disordered sex offender under F.S. §917.19.

**DEFENDANT:**

Name: SULLIVAN, ROBERT  
Age: 25 years  
Race: White  
Crime: First Degree Murder

**SOURCE OF INFORMATION:**

Record reviewed at Supreme Court

**TRIAL PROCEEDINGS:**

Circuit Court, Dade County, Case No.

**JURY RECOMMENDATION:**

Death

**SENTENCE OF COURT:**

Death; Judgment entered on November 12, 1973.

**APPELLATE PROCEEDINGS:**

Supreme Court, Case No. 44,750

Supreme Court affirmed the decision on December , 1974.

**SUMMARY OF THE CASE:**

SULLIVAN, a 25 year old white University of Miami student was indicted for the first degree murder of a restaurant manager.

An accomplice, who pled guilty, testified that SULLIVAN and the accomplice robbed a Howard Johnson's restaurant immediately after it had closed for the night. They abducted the manager of the restaurant at gunpoint, tied his hands behind him and drove to a swampy area. They told the manager that he would be released without his clothing, although the accomplice stated that SULLIVAN had earlier stated that he wanted to kill. The two robbers and the victim got out of the car and the victim was forced to walk in the swamp. SULLIVAN was walking behind the victim. While walking, the victim slipped and fell. SULLIVAN struck him twice with a tire iron, got a shotgun from the accomplice, shot him in the back of the head with both barrels while the victim was prone, reloaded and shot both barrels again, and said "I don't feel no different".

A plea of not guilty was entered. Following trial, the jury returned a verdict of guilty and recommended the

death penalty. The Court made a separate finding of fact aso the following aggravating and mitigating circumstances; **AGGRAVATING CIRCUMSTANCES:** (A) The death of the victim occurred while the defendant was engaged in the commission of a crime of armed robbery; (B) the capital felony was committed for pecuniary gain as the victim has been robbed of all his personal possessions as well as possessions of the company he represented; (C) the crime was especially heinous, atrocious and cruel. "The defendant saw fit to braggadociously state that he wanted a 'crime' which in his mind was to be the 'perfect crime.'" The victim was bound with his hands behind his body with adhesive tape, mentally toyed with by the defendant as to operating and management techniques of the establishment where worked, a place where the defendant was previously employed. After this mental exercise, the victim was led to a lonely spot in Dade County with his hands still behind him and as he stumbled in the darkness, struck from behind with a tire iron and then again from behind while on the ground in a totally helpless position, was mortally wounded with four blasts from a 12 gauge shotgun to the back of the head. "This Court cannot conceive of a more conscienceless crime". and (D) "This Court has observed the demeanor and the actions of the defendant throughout the trial and has not observed a scintilla of remorse displayed, indicating full well to this Court that the death penalty is the proper selection of the punishment in this particular case".

The Court found the only mitigating circumstances, being the defendant's age, 25 years, not sufficient mitigation.



Upon this finding of facts the court sentenced the defendant to death.

### DEFENDANT

Name: PEOPLES, SYLVESTER  
 Age: Not available from record  
 Race: Black  
 Crime: First Degree Murder

### SOURCE OF INFORMATION:

Record reviewed at Second District Court of Appeal

### TRIAL PROCEEDINGS:

Circuit Court, Hillsborough County, Case No.

### JURY RECOMMENDATION:

Death

### SENTENCE OF COURT:

Life;

### APPELLATE PROCEEDINGS:

Second District Court of Appeal, Case No. 73-591  
 Affirmed in *per curiam* decision, May 8, 1974.

### SUMMARY OF THE CASE:

PEOPLES had stationed himself at a second story window across the street from his girlfriend's house

where she was sitting with the victim, a young black man, on the porch. PEOPLES knew the victim and had had several arguments with him over the girlfriend. PEOPLES shot the victim in the head with a rifle, ran from the house, still carrying the rifle, turned himself in to a policeman.

A plea of not guilty was entered. The Jury returned a verdict of guilty. The State stipulated that there were no aggravating circumstances to warrant jurors determining that the defendant should be given the death penalty.

The Court made no separate finding of fact and sentenced the defendant to life with a recommendation that the parole board not review his case for 20 years.

NOTE: The trial and sentencing judge was the Honorable Walter N. Burnside, Jr., Circuit Judge.

### DEFENDANT:

Name: MARTIN, ROBERT LEE  
 Age: 17 years  
 Race: Black  
 Crime: First Degree Murder

### SOURCE OF INFORMATION:

Record reviewed at Dade County Circuit Court.

### PLEA NEGOTIATIONS:

MARTIN pled guilty to first degree murder in exchange for life sentence. He then testified against co-defendant

at a subsequent trial. There was no jury impaneled to recommend sentence.

### **SENTENCE OF COURT:**

Life; Judgment entered on March 12, 1974.

### **APPELLATE PROCEEDINGS:**

District Court of Appeal, Third District, Case No. 74-1409

### **SUMMARY OF THE CASE:**

MARTIN was indicted by a Dade County Grand Jury for first degree murder of a white, female junior college student.

MARTIN was with two other boys in a junior college parking lot after a football game, when they spotted a young girl in a parked car. Defendant approached the victim and asked for a cigarette, which she gave him. The defendant then discussed with his two friends the possibility of raping her, and allegedly attempting robbery. The victim sprayed mace at the defendant from a small can she kept in her car. The defendant then shot the victim in the eye.

A plea of guilty was entered. The Court accepted the plea, and in accord with the terms of the plea negotiations, sentenced the defendant to life imprisonment. No separate findings of fact were made.

Based on the foregoing fact, it would appear the following aggravating circumstances existed: the crime

was committed while the defendant was committing or attempting robbery and rape; it was committed for pecuniary gain; and was especially heinous, atrocious and cruel.

It would further appear the only mitigating circumstance which existed was age.

### **DEFENDANTS:**

Name: MORRIS, CALVIN  
SWAN, LLOYD  
Ages: MORRIS: 16 years  
SWAN: 19 years  
Races: MORRIS:  
SWAN:  
Crime: First Degree Murder

### **SOURCE OF INFORMATION:**

### **TRIAL PROCEEDINGS:**

Circuit Court, Dade County, Case No.

### **JURY RECOMENDATION:**

Life for both defendants

### **SENTENCE OF COURT:**

MORRIS; Life  
SWANN: Death



**APPELLATE PROCEEDINGS:**

MORRIS: District Court of Appeal, Third District, Case No.

SWAN: Supreme Court, Case No.

**SUMMARY OF THE CASE:**

MORRIS and SWAN were indicted by a Dade County Grand Jury for the first degree murder of HONEY REA, a 49 year old white woman on May 29, 1973. The indictment was predicated on the felony murder rule.

The defendants broke into a residence at night where the victim was a live-in housekeeper. The residence was rifled and various items were stolen. The victim was bound, gagged and beaten. She died a week after the attack.

A plea of not guilty was entered. Following trial, the jury returned a verdict of guilty and recommended a life sentence for both SWAN and MORRIS. The Court sentenced MORRIS to life imprisonment and SWAN to death and made separate findings of fact as to aggravating and mitigating circumstances. The Court found (1) that MORRIS and SWAN broke and entered the premises and committed an assault on the victim; (2) the capital felony was heinous, atrocious and cruel. SWAN had been adjudicated guilty of resisting arrest with violence, but the Court said this fact would not be considered an aggravating circumstance.

The Court found the mitigating circumstances were MORRIS' age (16 years), SWAN'S age (19 years) and

that MORRIS had no significant history of prior criminal activity.

**DEFENDANT:**

Name: SMITH, KENNETH TYRONE

Age: 15 years

Race: Black

Crime: First Degree Murder and Assault with Intent to Commit First Degree Murder

**SOURCE OF INFORMATION:**

Record reviewed at Circuit Court in Dade County.

**TRIAL PROCEEDINGS:**

Circuit Court, Dade County, Case No. 73-5469B

**JURY RECOMMENDATION:****SENTENCE OF COURT:**

Life; Judgment entered on May 24, 1974.

**APPELLATE PROCEEDINGS:****SUMMARY OF THE CASE:**

SMITH was indicted by a Dade County Grand Jury for first degree murder of a 17 year old white male, and assault with intent to commit first degree murder of another 17 year old white male.

The facts and circumstances of the crime, taken from the co-defendant's statement and substantiated by the surviving victim, are as follows: The two victims had approached the defendant, offering him \$10.00 to buy reefers for them. SMITH, high on drugs, told the co-defendant he wanted to net more than \$10.00, and intended to rob the victims. SMITH and the co-defendant then approached the victims' car. SMITH pulled out a pistol and told the victims to exit from the car, and demanded their money. One victim pulled out a knife. SMITH then shot both, killing one and injuring the other.

A plea of guilty was entered in the Juvenile Court and accepted by the Judge. SMITH was subsequently indicted by a grand jury, pled not guilty, and was tried. The jury brought in a verdict of guilty.

The court made no separate finding of fact and sentenced the defendant to life imprisonment for the murder and 10 years for assault with intent to commit first degree murder, to run concurrently.

Based on the foregoing facts it would appear that the following aggravating circumstances existed: the murder was committed while the defendant was committing or attempting a robbery; it was committed for pecuniary gain; and it was especially heinous, atrocious, or cruel.

It would further appear the following mitigating circumstances existed: the age of the defendant, and possibly that due to drugs, the defendant was under extreme mental or emotional disturbance, and had an impaired capacity to appreciate the criminality of his conduct or conform to requirements of law.

#### **DEFENDANT:**

Name: SMITH, DARNELL  
Age: 17 years  
Race: Black  
Crime: First Degree Murder

#### **SOURCE OF INFORMATION:**

Record reviewed at First District Court of Appeal.

#### **PLEA NEGOTIATION:**

SMITH pled guilty in exchange for life sentence in the Circuit Court of Duval County, Florida, Case No. 73-4613-CF

#### **JURY RECOMMENDATION:**

There was no jury impaneled to recommend sentence.

#### **SENTENCE OF COURT:**

Life; Judgment entered March 1, 1974.

#### **APPELLATE PROCEEDINGS:**

First District Court of Appeal, Case No. V-331  
Affirmed in *per curiam* decision.

#### **SUMMARY OF THE CASE:**

SMITH pled guilty to the first degree murder of LEROY THOMAS during an armed robbery of Church's Fried Chicken in Jacksonville on November 16, 1973. The Record on Appeal does not give further details of the crime.



The record indicated that there were no aggravating circumstances other than that the crime was committed during the commission of a robbery and that mitigating circumstances were SMITH's age, his lack of prior criminal activity, and his questionable ability to appreciate the criminality of his conduct. Defense motions for judgment of insanity were denied, and SMITH pled guilty to first degree murder with the understanding that the Court would sentence him to life in prison. A pre-sentence investigation was ordered by the Court and SMITH was subsequently sentenced to life in prison. There is no finding of fact in the record.

#### DEFENDANTS:

Names: FLICKER, ARNOLD  
 FLICKER, DAVID  
 MAGNANI, PAUL  
 HESTER, DAVID  
 FRANCIS, KENNETH  
 BROWN, MICHAEL  
 GEASLIN, ELVIS  
 SIMMONS, BRUCE

Ages: FLICKER, ARNOLD: middle-aged  
 FLICKER, DAVID: 20 years  
 All others in late teens

Races: All White

Crime: First Degree Murder

#### SOURCE OF INFORMATION:

Record reviewed at Circuit Court of Volusia County.

#### PLEA NEGOTIATIONS:

DAVID FLICKER pled guilty to *third degree murder*. DAVID HESTER, BRUCE SIMMONS and KENNETH FRANCIS pled guilty to *first degree murder*, in exchange for life sentences.

#### TRIAL PROCEEDINGS:

MAGNANI, BROWN and GEASLIN, Circuit Court, Volusia County, Case No.

#### JURY RECOMMENDATION:

Life

#### SENTENCE OF COURT:

Life

#### APPELLATE PROCEEDINGS:

#### SUMMARY OF THE CASE:

MAGNINI, HESTER, FRANCIS, BROWN, GEASLIN, AND SIMMONS, all white and in their late teens, were indicted for the first degree murder of MRS. VIVIAN OYLER, an elderly white woman in Volusia County, on October 2, 1973.

ARNOLD FLICKER, a middle-aged white man and his son, DAVID FLICKER, age 20, recruited BROWN and MAGNANI to kill MRS. OYLER for \$2,500.00 because she would not sell her land to the FLICKERS. BROWN

and MAGNINI broke into the OYLER house and attempted to kill her. She managed to lock interior doors in the house so that they could not get to her and then call the police, but BROWN and MAGNINI fled before the police arrived. Undaunted, a second attempt was made a few days later. BROWN and DAVID FLICKER went to the house, and while BROWN attempted to silence a dog on the premises with a can of dog repellent, DAVID FLICKER cut the telephone wires leading into the house. The dog was not overcome by the repellent, however, and his barking frightened away the would-be attackers. They then decided that if they were to kill MRS. OYLER they would need additional help.

HESTER, GEASLIN, SIMMONS and FRANCIS were recruited from the boardwalk in Daytona Beach. A week before the murder, several of the defendants dug a grave in an isolated area of the County. On the afternoon of October 2, 1973, DAVID FLICKER and BROWN inspected the grave to make sure that it was deep enough and undetected. The group assembled on the FLICKERS' property, adjoining the OYLER residence, at 8:00 p.m. and awaited darkness.

The FLICKERS gave the other members hammers and wooden mallets. After dark, two of the group went to the front of the OYLER house to distract the dog. BROWN, GEASLIN, SIMMONS, HESTER and FRANCIS all broke into the house and began beating Mrs. OYLER with the hammers and mallets. The steel-handled hammer used by SIMMONS was wielded with such force that the handle was bent. After the beating, BROWN forced a wooden mallet into the victim's vagina. They then dragged the victim across the

backyard to the FLICKER property, where she was loaded into a Corvair, taken to the grave and buried. Several of the group remained on the FLICKER property awaiting the return of the burial crew. Upon their return, the FLICKERS paid the agreed \$2,500.00 fee, less a \$20.00 advance. The group members drank some wine and then went their separate ways.

SIMMONS went to the bus station and talked of his experience to a drifter, who was an undercover informant. The informant called the police authorities, who arrested SIMMONS. SIMMONS gave a detailed statement which led to the arrest of the others.

ARNOLD FLICKER was adjudged incompetent to stand trial and committed to the state mental hospital. DAVID FLICKER, his son, pled guilty to third degree murder. HESTER, SIMMONS and FRANCIS all pled guilty to first degree murder and were sentenced to life imprisonment. MAGNANI, BROWN and GEASLIN pled not guilty and were convicted of first degree murder. The jury recommended life imprisonment and the court sentence them to life.

The aggravating circumstances presented for BROWN, MAGNANI and GEASLIN were that the crime was committed for pecuniary gain and that it was especially heinous, atrocious and cruel.

The mitigating circumstances common to all three were (1) no significant prior criminal activity and (2) their age (all in their late teens). BROWN attempted to show that he was under the substantial domination of MAGNANI, and MAGNANI sought to show that his mental state impaired his capacity to appreciate the criminality of his conduct or conform to the requirements of law.



The Court made no separate findings of fact in connection with any of the sentences.

#### DEFENDANT:

Name: GRAY, DANIEL  
 Age: 15 years  
 Race: White  
 Crime: First Degree Murder

#### SOURCE OF INFORMATION:

Record reviewed at Third District Court of Appeal.

#### TRIAL PROCEEDINGS:

Circuit Court, Dade County

#### JURY RECOMMENDATION:

Jury recommendation was included in the verdict as the jury "beg[ged] the Court for mercy and any and all services available. . . for rehabilitation."

#### SENTENCE OF COURT:

Life; Judgment entered March 6, 1974.

#### APPELLATE PROCEEDINGS:

District Court of Appeal, Third District, Case No. 74-832

#### SUMMARY OF THE CASE:

GRAY and a co-defendant, both 15 years old, entered a business office in the morning, the secretary letting them in because she recognized one as a part-time odd job employee of the owner. They beat the 22 year old female secretary with chukkers, promising to quit if she would stop screaming, which she did. They took \$300 in cash from the office safe, and then sat waiting for the owner to arrive so they could get more money. The victim, age 60, a client of the business, came to the door. GRAY began beating him with the chukkers, and then the secretary heard a shot ring out. The victim died of a shotgun wound to the head. The defendant was in possession of the shotgun shells when arrested about 30 minutes later in the office. Who pulled the trigger was not proven at trial, but the State relied on the felony murder doctrine in closing arguments at trial.

A plea of not guilty by reason of insanity was entered, and following the trial, the jury brought in a verdict of guilty, coupled with a proviso that they "begged the court for mercy and any and all service available be extended to the defendant for rehabilitation." There was no separate sentencing proceeding held.

The court made no separate finding of fact in accepting the jury's recommendation and sentencing the defendant to life imprisonment.

Based on the foregoing facts, it would appear the following aggravating circumstances existed; murder committed while committing, attempting, aiding, or fleeing robbery; murder committed for pecuniary gain; and possibly that the murder was especially heinous, atrocious, or cruel.

It would further appear the following mitigating circumstances existed: no significant prior criminal activity; committed while under extreme mental or emotional disturbance and/or impaired capacity to appreciate criminality of conduct or conform to requirements of law (the defendant had a low IQ and drug involvement was mentioned); and the age of the defendant.

#### DEFENDANT:

Name: HALL, TODD ALEXANDER  
 Age: 17 years  
 Race: Black  
 Crime: First Degree Murder

#### SOURCE OF INFORMATION:

Record review at Fourth District Court of Appeal.

#### TRIAL PROCEEDINGS:

Circuit Court of Indian River County, Case No. 73-151

#### JURY RECOMMENDATION:

Life

#### SENTENCE OF COURT:

Life: Judgment entered November 19, 1973.

#### APPELLATE PROCEEDINGS:

District Court of Appeal, Fourth District, Case No. 73-1472

Affirmed in *per curiam* decision.

#### SUMMARY OF THE CASE:

HALL, a 17 year old black male, was indicted for the first degree murder of a 60 year old white male in Indian River County.

On June 15, 1973, HALL and his brother OGEAN entered a small convenience store north of Vero Beach. Upon gaining entry, they grabbed Mrs. MORGAN HEINLEY and threw her to the floor. At this time, the victim (age 60 and white) emerged for the rear of the store, and HALL turned and fired one shot, striking him in the right eye, penetrating his skull and killing him. HALL claimed accidental discharge of the firearm.

At the trial, HALL strongly contended that there was no evidence of a robbery in that no words were spoken by either of the two defendants at any time nor was any money or property taken. The jury returned a verdict of guilty of first degree murder. The jury recommended a sentence of life imprisonment be imposed.

The Judge, who had also presided over co-defendant OGEAN HALL'S trial, wherein OGEAN was convicted of second degree murder, ordered a pre-sentence investigation. The defendant was returned to Court on November 19, 1973 where he was adjudged guilty and sentenced to life imprisonment.

The Judge did not make a written finding of fact but it can be established from the record that as far as aggravating circumstances are concerned there were two: (1) The offense was while in the perpetration of a robbery and (2) was intended for pecuniary gain.



By way of mitigation, it appears that the defendant had no prior significant criminal activity and that his age was a major consideration.

The conviction and sentence were affirmed by the Fourth District Court of appeal in a per curiam decision.

#### **DEFENDANT:**

Name: BISSONETTE, ROY IVAN  
Age: 15 Years  
Race: Not available from record  
Crime: First Degree Murder and Robbery

#### **SOURCE OF INFORMATION:**

Record reviewed at Fourth District Court of Appeal.

#### **TRIAL PROCEEDINGS:**

Circuit Court, Brevard County, Case No. 73-440

#### **JURY RECOMMENDATION:**

Life (unanimous)

#### **SENTENCE OF COURT:**

Life; Judgment entered August 24, 1973

#### **APPELLATE PROCEEDINGS:**

District Court of Appeal, Fourth District, Case No. 73-1163.

#### **SUMMARY OF THE CASE:**

BISSONETTE was indicted in Brevard County for murder in the first degree and robbery, in the shooting death of a 30 year old white male.

On March 12, 1973, BISSONETTE was hitchhiking back to his home state of New Jersey. He was picked up by the victim along the highway in Brevard County. After riding along for some time, it was claimed by BISSONETTE that the victim made indecent sexual advances against him. At this time, BISSONETTE secured a .32 caliber pistol and apparently shot the victim numerous times. The victim's body was found in some underbrush along the roadside with five shots in the head, two shots in the right arm, four shots in the chest and one shot in the hand - 12 wounds in all.

The defendant was apprehended some distance up the road, and a check run on the automobile determined that it was not his. Also, found in the defendant's possession in addition to the pistol was a wallet and credit cards belonging to the victim.

The defense at the trial was self-defense. The defendant was found guilty of first degree murder.

During the sentencing hearing it appeared that the following aggravating circumstances were present; (1) the defendant had a substantial juvenile record, (2) the capital felony was committed during the perpetration of a robbery, and (3) the capital felony was committed for pecuniary gain.

The only mitigating circumstance was that the defendant was only 15 years old. After deliberating four minutes, the jury unanimously recommended a life sentence. The Judge followed the jury's recommendation.

#### COMMENT:

The defense of self-defense was apparently rejected because the gun had to be reloaded to shoot the victim so many times. The Judge at the sentencing hearing did not allow cross-examination of defense witnesses.

#### DEFENDANT:

Name: MC BRIDE, ALPHONSO  
Age: 17 years  
Race: Black  
Crime: First Degree Murder

#### SOURCE OF INFORMATION:

Record reviewed at Fourth District Court of Appeals.

#### TRIAL PROCEEDINGS:

Circuit Court, Indian River County, Case No. 73-15

#### JURY RECOMMENDATION:

Life

#### SENTENCE OF COURT:

Life; Judgment entered August 9, 1973.

#### APPELLATE PROCEEDINGS:

District Court of Appeal, Fourth District, Case No. 73-1047

Affirmed in *per curiam* decision

#### SUMMARY OF THE CASE:

On December 13, 1972, MC BRIDE apparently arrived at a Seven Eleven at the South County Line in Vero Beach, Florida. He entered the store and, during an attempt to steal the money from the cash register, got into a fight with the proprietor there. He pistol whipped the individual severely about the face and head and then fired one shot, killing the victim. The money in the cash register was taken.

The jury found MC BRIDE guilty of first degree murder. The following aggravating circumstances appeared to be present: The murder was committed during the perpetration of a robbery, and that it was committed for pecuniary gain. It was also arguable that it was especially heinous, atrocious and cruel in that evidence was presented to show that the defendant had robbed the same store and the same proprietor approximately a week before. At the time of this previous robbery he had clicked the revolver in the man's face several times and told him that the next time he came to rob he was going to kill him.

By way of mitigating circumstances, the defendant established that he had no prior criminal activity and his age being 17 years was taken into consideration. The jury returned a recommendation of life imprisonment.



The Judge then ordered a pre-sentence investigation and upon its return on August 9, 1973, adjudge the defendant to be guilty and sentenced him to life imprisonment with a minimum of 25 years to be served. The Judge did not make any written findings of fact.

#### DEFENDANT:

Name: DOBBERT, ERNEST JOHN  
 Age: 33 years  
 Race: White  
 Crime: First Degree Murder of Two Children;  
 Child Torture of Two Children; Child  
 Torture and Child Abuse of Two Children.

#### SOURCE OF INFORMATION:

Record reviewed at Supreme Court.

#### TRIAL PROCEEDINGS:

Circuit Court, Duval County, Case No.

#### JURY RECOMMENDATION:

Life (10 to 12 jurors recommended life sentence)

#### SENTENCE OF COURT:

Death; Judgment entered April 12, 1974.

#### APPELLATE PROCEEDINGS:

Supreme Court, Case No. 45,558

#### SUMMARY OF THE CASE:

ERNEST JOHN DOBBERT, III, age 11, scarred, battered, broken arm, and poor visioned, ran away from home on April 6, 1972 and was later discovered by authorities. He subsequently revealed that the scars and bruises were caused by severe beatings from his father. He further alleged that he and his brothers and sisters, KELLY ANN (9), RYDER SCOTT (7), and HONORE ELIZABETH (5), had been systematically subjected to brutality by his father. He further alleged that KELLY ANN and RYDER SCOTT were dead, KELLY ANN alleged to have died of the flu, and RYDER SCOTT of cancer, and that he had assisted his father in the burials. JOHN also alleged that his brother and sister were buried because his father did not want the authorities to see the wounds. The defendant subsequently confessed to Father Anthony J. Muldery of St. Anthony's Church in Ft. Lauderdale, Florida. He stated that two of his children had died of natural causes and that he had buried the children himself in an unknown cemetery in Jacksonville. Approximately one month later, DOBBERT was arrested in Houston, Texas. The bodies of the children were never found.

DOBBERT was sentenced to death on the first count of the indictment for murder of one child and to consecutive sentences of the maximum penalty of 46 years on the other counts of the indictment. In a detailed finding of fact, encompassing several pages, the Judge explicitly delineated prior offenses by DOBBERT against his children, including punishing ERNEST by burning his hand over an open flame on a gas range; kicking, choking and beating KELLY, ERNEST and HONORE.

The Judge listed the aggravating circumstances also as the prevention of arrest, prosecution and imprisonment by terrorizing and brutalizing the children and by lies and deception towards police and social agencies when they would come to investigate complaints. He noted that there were several charges of assault previously against the children in Wisconsin, that DOBBERT knowingly created a risk of death to many persons, that DOBBERT constantly beat his daughter, KELLY, causing her to be violently and chronically ill from the torture, that these murders and series of unspeakable horrors and sadism against the children combined to make this what the Judge termed in his 22 years of legal experience, the most heinous, atrocious and cruel crime he had ever seen.

As to mitigating circumstances, the Judge prevented several considerations that might have constituted mitigating circumstances such as psychiatric testimony but concluded that even the psychiatrist said that DOBBERT understood the nature and quality and wrongfulness of his acts, knew right from wrong and was able to adhere to the right. In listing several other items of fact under each mitigating circumstance that could possibly be considered, the Judge concluded that there were *no* mitigating circumstances present.

#### DEFENDANT:

Name: GOULD, CARLTON  
 Age: about 25 years  
 Race: Black  
 Crime: First Degree Murder

#### SOURCE OF INFORMATION:

Conference with trial court counsel.

#### PLEA NEGOTIATIONS:

GOULD pled guilty in the Circuit Court of Putnam County.  
 No jury was impaneled for recommendation of sentence.

#### SENTENCE OF THE COURT:

Life;

#### APPELLATE PROCEEDINGS:

Counsel indicated that no appeal is planned.

#### SUMMARY OF THE CASE:

GOULD brutally stabbed to death an elderly well-respected woman alone in her store when she allegedly caught him shoplifting. After the murder, he took the money from the cash register. Defense counsel indicated that GOULD had a bad record with convictions for several other crimes. Community feeling in Palatka was extremely high against GOULD. Plea negotiations were held, and GOULD pled guilty to the murder and to several other crimes in exchange for a life sentence. Defense counsel indicated that there were no mitigating circumstances.

#### DEFENDANT:

Name: MARTIN, EVANS  
 Age: 25 years  
 Race: White  
 Crime: First Degree Murder



**SOURCE OF INFORMATION:**

Conference with trial court counsel.

**TRIAL PROCEEDINGS:**

Circuit Court, Highland County

**JURY RECOMMENDATION:**

Life

**SENTENCE OF COURT:**

Life

**APPELLATE PROCEEDINGS:**

Defense counsel indicated that no appeal is planned.

**SUMMARY OF THE CASE:**

MARTIN and a co-defendant JAMED EDWARD KEEL murdered MARTIN'S father-in-law for some money the believed he carried in the trunk of his car. The two had bought some stolen Travelers Checks in North Carolina and had come to Florida on a spree.

MARTIN had a criminal record in North Carolina, including grand larceny, breaking and entering and charges of conspiracy to commit robbery.

On the pretense of visiting the victim at his home, MARTIN and KEEL shot him from behind and got the key to the trunk of the car. The victim, however, had

transferred his money to a safety deposit box and a savings account. KEEL pled guilty and testified for the State. MARTIN was found guilty of first degree murder, and the jury recommended life and the Judge sentenced him to life in prison.

**COMMENT:**

Planned murder for pecuniary gain.

**DEFENDANT:**

Name: HUCKLEBURY, CHARLES

Age: 27

Race: White

Crime: First Degree Murder

**SOURCE OF INFORMATION:**

Conference with defense counsel.

**PLEA NEGOTIATIONS:**

HUCKLEBURY pled guilty to first degree murder in the Circuit Court for \_\_\_\_\_ County, in exchange for a life sentence. No jury was impaneled for advisory sentence.

**SENTENCE OF COURT:**

Life

**APPELLATE PROCEEDINGS:**

Defense counsel indicated that no appeal was planned.

**SUMMARY OF THE CASE:**

HUCKLEBURY was hired to kill ALAN RUMMELL for the sum of \$15,000.00. RUMMEL had four years previously beaten CLARENCE OWEN, an elderly man who sought revenge by hiring a murderer through a newspaper ad for a "wrestler." The victim was shot three times in a pick-up truck and dumped along the side of the road.

Conference with counsel indicated that plea negotiations were held and that HUCKLEBURY pled guilty to first degree murder in exchange for life sentence. HUCKLEBURY has no prior record.

**COMMENT:**

Murder for hire.

**DEFENDANT:**

Name: RUSSELL, COLON HENDERSON  
 Age: mid-30's  
 Race: White  
 Crime: First Degree Murder

**SOURCE OF INFORMATION:**

Conference with defense counsel.

**TRIAL PROCEEDINGS:**

Circuit Court, Lafayette County.

**JURY RECOMMENDATION:**

Life

**SENTENCE OF COURT:**

Life

**APPELLATE PROCEEDINGS:**

No appeal has yet been taken.

**SUMMARY OF THE CASE:**

RUSSELL shot and killed a game warden who caught him deer hunting illegally at night. He claimed self-defense, but he had shot the game warden four or five times, changed his car tires, and did not report the incident. He was traced through the car that he had been driving.

Conference with counsel indicated that the case was tried and RUSSELL found guilty of first degree murder. At the sentencing hearing, RUSSELL took the stand and stated in response to questions asked by defense counsel that he was in his mid-30's, that he had not intended to kill the game warden, and that he regretted that the game warden was dead. The jury recommended a life sentence and the Judge agreed. Defense counsel indicated that an appeal is being considered.

**COMMENT:**

The Court apparently discounted the aggravating circumstances of a crime committed to disrupt government law enforcement.



**DEFENDANT:**

Name: O'QUINN, WILLIAM  
 Age: 50 years (approx)  
 Race: White  
 Crime: First Degree Murder

**SOURCE OF INFORMATION:**

Conference with counsel.

**PLEA NEGOTIATIONS:**

O'QUINN pled guilty to first degree murder in the Circuit Court for Nassau County in exchange for a life sentence.

**SENTENCE OF THE COURT:**

Life

**SUMMARY OF THE CASE:**

O'QUINN shot his wife between the eyes in front of their 5 children. He thought his wife had been having an affair and had threatened several times to kill her. The day he killed her, he came into the house where she and the children were eating dinner, said he had decided to kill her and asked her if she wanted him to do it outside or there in front of the children. She replied that if he was going to do it, he had better do it there and get it over with, whereupon he shot her.

Conference with counsel indicated that O'QUINN had a heart condition and could not work. Plea negotiations

were held, and O'QUINN pled guilty in exchange for a life sentence. Conference with counsel indicated that no appeal of this case is planned.

**COMMENT:**

This appears to be a case of premeditated and cold-blooded murder, involving a risk of death or serious injury also to the children around. The only mitigating circumstance seems to be the age of the defendant.

**DEFENDANT:**

Name:  
 Age: 27 years (approx)  
 Race: White  
 Crime: First Degree Murder

**SOURCE OF INFORMATION:**

Conference with counsel

**PLEA NEGOTIATIONS:**

Defendant pled guilty to first degree murder in exchange for a life sentence in the Circuit Court of Nassau County, Case No.

**SENTENCE OF COURT:**

Life; Judgment entered

**APPELLATE PROCEEDINGS:**

**SUMMARY OF THE CASE:**

was hired to kill the wife of a MR. BARBER, a millionaire in Fernandina Beach, who did not want to give his wife his money in a divorce settlement.

killed the wrong woman, shooting a neighbor's wife instead. The story was not unraveled until 5 years after the woman was killed.

At BARBER'S trial, the death penalty was sought, but the Judge felt that BARBER was too old and sentenced him to life in prison where he died from natural causes. Counsel for indicated that plea negotiations were held and that because BARBER had not been sentenced to death, would not be either. He pled guilty to first degree murder in exchange for a life sentence.

**COMMENT:**

Counsel indicated that had been in jail several times. Apparently the only reason the death penalty was not pursued in this case was that the man who had hired to kill his wife was not given the death penalty.

**DEFENDANT:**

Name: GENTRY, JACKIE  
Age: 19 years (approx)  
Race: Black  
Crime: Rape of a Child

**SOURCE OF INFORMATION:**

Conference with counsel.

**PLEA NEGOTIATIONS:**

GENTRY pled guilty to the rape in exchange for life sentence,

**SENTENCE OF COURT:**

Life; Judgment entered

**APPELLATE PROCEEDINGS:****SUMMARY OF THE CASE:**

GENTRY was charged with the rape of his 6 year old niece. He broke into his sister's house where 4 children were sleeping, picked up the victim, and walked out of the house, taking her to the railroad tracks where he raped and left her nude and unconscious between the rails. He was arrested when he returned home but refused to say where the child was. The next day, 13 cars of a train ran over her before the engineer could stop the train. Extensive surgery on the victim was necessary.

GENTRY was under the influence of marijuana and alcohol at the time he attacked the child. Conference with counsel indicated that while psychiatric examination showed him to be legally sane, both prosecution and defense knew of his reputation for doing "crazy things".

**DEFENDANT:**

Name: BURCHFIELD, RILEY  
Age: 23 years  
Race: White  
Crime: First Degree Murder



**SOURCE OF INFORMATION:**

Conference with defense counsel.

**PLEA NEGOTIATIONS:**

BURCHFIELD pled guilty to first degree murder in exchange for life sentence in the Circuit Court of Polk County, Case No.

**SENTENCE OF COURT:**

Life; Judgment entered

**APPELLATE PROCEEDINGS:**

Defense counsel indicated that no appeal will be taken.

**SUMMARY OF THE CASE:**

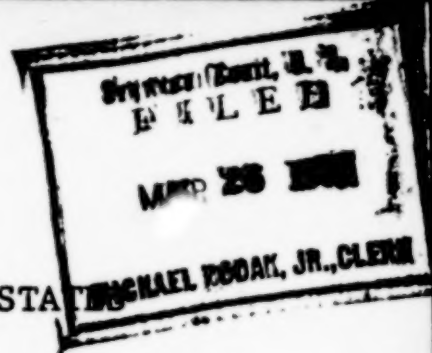
BURCHFIELD shot and killed his 4 year old stepson, while the child was in bed. The child's mother, BURCHFIELD'S second wife, was having an affair and BURCHFIELD had allegedly told her that if he ever caught her, he would kill her child. One night when he thought out where his wife was and talked with his wife and her family about their problems. He and his wife began fighting, the gun fell down, he picked it up, where the child was asleep, held the gun about a foot from the child's chest and pulled the trigger. He then left the house, called his sister and told her what he had done. He turned himself in to the police and fully confessed. He was indicted for first degree murder.

Defense counsel indicated that there was no insanity defense and no question of incompetence to stand trial. There was, according to counsel, tremendous community pressure for the death penalty for BURCHFIELD. He had a record of arrests for drug violations. After 3 months of pre-trial procedures, plea negotiations were held.

**COMMENT:**

This was clearly a case of a premeditated and cold-blooded murder of a child. No mitigating circumstances were indicated.

IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1975  
No. 75-5706



CHARLES WILLIAM PROFFITT,  
Petitioner,

-vs-

STATE OF FLORIDA,  
Respondent.

ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF FLORIDA

BRIEF OF RESPONDENT

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IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1975  
No. 75-5706

---

CHARLES WILLIAM PROFFITT,  
Petitioner,  
-vs-

STATE OF FLORIDA,  
Respondent.

---

ON WRIT OF CERTIORARI TO THE  
SUPREME COURT OF FLORIDA

---

BRIEF OF RESPONDENT

PRELIMINARY STATEMENT

Pursuant to Rule 40, Rules of the United States Supreme Court, Respondent will not include in this brief (1) reference to official report of the court below; (2) a jurisdictional statement; (3) a reference to statutes involved in the case; or (4) questions presented for review.



Respondent will include a statement of the case.

STATEMENT OF THE CASE

Respondent, in most instances, accepts the statement of the case contained at pages 9 through 21 of Petitioner's brief.

Primarily, the facts involved are not in dispute, nor of great interest to this Court in determining the questions presented herein. However, Petitioner has raised some doubt as to his mental condition existing at the time of the commission of the crime.

Rule 3.210, Florida Rules of Criminal Procedure, requires that when a defendant intends to rely on the defense in insanity, at the time of the offense, advance notice

of such defense must be given by the defendant. Petitioner at the time of his trial did not place in issue his sanity pursuant to the Florida Rules. The question that Petitioner *might* have been unable to conform his conduct (while under an extreme mental disturbance) to the requirements of law is placed in issue herein by Petitioner by including in the statement of the case portions of the testimony of Dr. James Crumbly, M.D.. Petitioner in his brief makes much of the latter portion of Dr. Crumbly's testimony, while tending to ignore the entire testimony of the doctor. (R 495-505) It should also be noted that the Petitioner, through trial counsel, waived any confidential privilege between the Petitioner and the doctor concerning this examination and the doctor's

testimony (R 497).

It was not until the Petitioner was found guilty and then at the sentencing portion of his trial that this testimony, indicating perhaps some deficiency in the mental capacity of the Petitioner at the time of the crime first was raised. It should also be brought to the Court's attention that upon a doubt being cast upon Petitioner's mental condition at the time of the crime that the trial court, prior to sentencing, directed psychiatric examination of the Petitioner to determine Petitioner's sanity at the time of the crime and at the time of the trial (R 43).

In response to said order, Petitioner was thoroughly examined by qualified psychiatrists and their reports, finding

Petitioner competent to stand trial and at the time of the crime, were filed with the trial court prior to sentencing (R 44) (R 46).

The *total* testimony of the doctor at the sentencing hearing was considered by the jury in reaching its recommendation for the imposition of the death penalty and it was only after the trial court had satisfied itself as to the Petitioner's sanity -- both at the time of the offense and at trial -- that the trial judge followed the jury's recommendation and sentenced Petitioner to death.

Although the issue now before the Court does not require that Respondent argue at great length either the guilt or innocence of Petitioner, Respondent feels it necessary

to comment thereon inasmuch as Petitioner has interposed in his brief the fact that he was perhaps under some type of an extreme mental disturbance. There is not one allegation by the Petitioner now before the Court as to Petitioner's actual trial, and in the absence of such an allegation it can only be considered that from arrest through conviction there is no element for argument. The guilt of Petitioner of the crime charged is without doubt. An examination of the psychiatric reports and medical testimony at sentencing, without argument, prove that Petitioner had a long-standing compulsion to kill, that he did kill, and that Petitioner himself believes that he is capable of killing again.

In the absence of allegations that the statutes of which now Petitioner complains

were improperly applied *sub judice*, it can then only be found that said statutes were properly applied to Petitioner; that there were sufficient aggravating circumstances upon which the jury and the sentencing judge could base the imposition of the death penalty; that the aggravating circumstances when balanced against mitigating circumstances (of which there were none) were properly applied; and that the imposition of the death penalty on Petitioner is a proper sentence in keeping with the offense committed.

#### SUMMARY OF ARGUMENT

It is obvious from Petitioner's brief as filed that actually two questions are involved. That is (1) whether the imposition of the death penalty is per se vio-



lative of the Constitution of the United States as being a cruel and unusual punishment, and (2) if the imposition of capital punishment is not cruel and unusual within the Constitutional sense, then can a state impose a capital sentence after due process?

Petitioner elects, however, to put the cart before the horse, so to speak, and argues the per se aspect of the Eighth Amendment last in his brief.

Respondent feels, that since the total of all issues now before the Court must first turn on this Court's primary determination as to whether the death penalty is cruel and unusual per se that this issue must, if logical sequence is to be maintained, be disposed of first. Since all

arguments of both Petitioner and Respondent regarding the due process application of the Fourteenth Amendment are bottomed on the assumption that the imposition of the death penalty is not per se cruel and unusual, then argument on this point must follow the disposition of the primary question. Respondent will therefore reverse the order of presentation of the points argued in Petitioner's brief and give argument first to the primary question involved.

Capital punishment is a traditional sanction, recognized as a permissible punishment, for those crimes that society considers the most dangerous.

Capital punishment is expressly referred to in the Fifth Amendment which also provides that no person shall be deprived of

life without due process of law. The Fifth, as well as the Eighth Amendment, which prohibits the infliction of cruel and unusual punishment, were both passed by the same legislative body at the same time, 1789, and was ratified by a vote of the people at the same time, 1791. It would be preposterous to assume that the legislative body drafting these two amendments and the electorate ratifying them could provide for capital crimes in one breath and at the same time provide against cruel and unusual punishment if, in fact, they intended that the infliction of the death penalty (capital crime), as provided in the Fifth Amendment, was a cruel and unusual punishment prohibited in the Eighth Amendment. This Court has, since the inception of these Amendments, and even as of today, refused to

invade these fundamental concepts of the Constitution, but to the contrary has held the imposition of the death penalty not cruel and unusual punishment, *Wilkerson v. Utah*, 99 U.S. 130; *In re Kemmler*, 136 U.S. 436.

Respondent responding to this Court's opinion in *Furman v. Georgia*, 408 U.S. 238, enacted Chapter 72-724, Laws of Florida, re-creating capital punishment in Florida. Respondent contends that this Court *did not* reverse the death penalties imposed by the state courts of Georgia and Texas in *Furman*, *supra*, on the grounds that the death penalty was *per se* cruel and unusual punishment, nor did this Court conclude that the death sentences as imposed therein were cruel and unusual as applied to the facts and circumstances of the cases

being considered. This Court's action, Respondent feels, was rather based upon the conclusion that the "system" itself was unconstitutional because it conferred upon juries and/or judges the power to *arbitrarily and indiscriminately* sentence a person to death or to life imprisonment and that experience demonstrated juries did so whimsically and freakishly.

Petitioner argues that Florida's new death penalty laws (Ch. 72-724, *supra*) still permit the same excessive discretionary procedures as condemned by this Court. Respondent submits that the mere presence of discretion in the stages of progression of a criminal trial -- from arrest to final appeal -- are not violative of the due process requirements of the Constitution

or of *Furman*, but it is the quality of a reasoned judgment and the manner in which it is reached and applied that must govern.

Admittedly, Florida's death penalty statute require reasoned judgments be made--both by the jury and the trial judge--in reaching the final decision as to the sentence that will be imposed on a convicted capital felon. A reasoned judgment though must be such as is within the permissible reasonable application of the law, and not outside sound permissible reason or arbitrarily or indiscriminately reached. It must be kept in mind that the reasoned judgment now complained of by Petitioner is the due process required *after conviction* and for the purpose of fixing punishment within permissible limits. The due process



clause imposes some restraint to assure the essential fairness by which discretion is used in fixing a punishment, however, as to require standards of due process, there are necessary and inherent differences between trial procedures and post-conviction procedures, such as sentencing. *Williams v. Oklahoma*, 358 U.S. 576 (1959).

Discretion and judgment are essential to the judicial process and are present at all stages of a criminal trial. The judicial process requires an exercise of reasoned judgment from arrest through arraignment, during trial, in the verdict, and determinatively of the sentence imposed. This judgment will always be present in the appeal of the conviction and sentence. As this Court is now asked to exercise its judgment, likewise, the juries, trial judges,

prosecuting attorneys, and appellate courts--as well as defense counsel--must always exercise judgment and it is not until final conviction whether or not the judgment as exercised will fall within the reasonable bounds of due process. There will never be a criminal trial under our judicial system where reasoned judgment or discretion is not required.

POINT I

CAPITAL PUNISHMENT IS NOT CRUEL  
AND UNUSUAL PUNISHMENT PER SE  
AND THEREFORE A LEGISLATURE MAY  
CONSTITUTIONALLY PROVIDE FOR  
THE IMPOSITION OF THE DEATH  
PENALTY.

The Petitioner in the case at bar has elected to rely upon the argument advanced by the petitioner in the case of *Fowler v. North Carolina*, Case No. 73-7031, and directs this Court's attention to pages 102-139 of the brief submitted by the petitioner in said case (Pet. Br., p. 102) to support his contention that the death penalty violates the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution. This being the case, Respondent will address itself to the argument advanced in the brief submitted in *Fowler v. North Carolina*, supra. Wherever Respondent makes a reference to

petitioner's brief under this Point, it will be to the *Fowler* brief.

Respondent notes that Petitioner has conveniently ignored the prior decisions of this Court which have, either explicitly or implicitly, held that capital punishment does not constitute cruel and unusual punishment prohibited by the Eighth Amendment. As Mr. Justice Blackmun noted in *Furman v. Georgia*:

" . . . This is either the flat or the implicit holding of a unanimous Court in *Wilkerson v. Utah*, 99 US 130, 134-135, 25 L.Ed 345, 347, in 1878; of a unanimous Court in *In re Kemmler*, 136 US 436, 447, 34 L. Ed 519, 524, 10 S Ct 930, in 1890; of the Court in *Weems v. United States*, 217 US 349, 54 L Ed 793, 30 S Ct 544, in 1910; of all those members of the Court, a majority, who addressed the issue in *Louisiana ex rel. Francis v. Resweber*, 329 US 459, 463-464, 471-472, 91 L Ed 422, 426, 430, 67 S Ct 374, in 1947; of Mr. Chief Justice Warren, speaking for himself and

three others (Justices Black, Douglas, and Whittaker) in *Trop v. Dulles*, 356 US 86, 99, 2 L Ed 2d 630, 641, 78 S Ct 599, in 1958, in the denial of certiorari in *Rudolph v. Alabama*, 375 US 889, 11 L Ed 2d 119, 84 S Ct 155, in 1963 (where, however, Justices Douglas, Brennan, and Goldberg would have heard argument with respect to the imposition of the ultimate penalty on a convicted rapist who had 'neither taken nor endangered human life'); and of Mr. Justice Black in *McGautha v. California*, 402 US 183, 226, 28 L Ed 2d 711, 737, 91 S Ct 1454, decided only last Term on May 3, 1971.

Of course, this Court's decision in *Furman* did not hold to the contrary (Burger, C.J., dissenting at 375 and 396) for if it did, the issue would not be presently before the Court in this case.

The standard of judicial review to be applied is whether there is a rational basis for the legislative judgment.

Petitioner acknowledges that due deference must be given to the legislative



judgments, but then insists that a "uniquely stringent standard of judicial review under the evolving standards of decency that mark the progress of a maturing society" (Pet. Br., p. 107) must be resorted to. Citing to footnote 4 in *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938), Petitioner asserts the legislation in question must be subjected to strict judicial scrutiny for the ". . . statutes fall harshly only upon 'discrete and insular minorities' . . . and . . . their operation takes a form that 'restricts those political processes which can ordinarily be expected to bring about the repeal of undesirable legislation. . .'" (Pet. Br. at 106-107).

With all due respect to counsel for Petitioner, Respondent suggests that Petitioner in his attempt to shift his heavy

burden of establishing there is no rational basis for the legislative judgment that capital punishment serves a valid governmental interest, *In re Kemmler*, supra; *Trop v. Dulles*, 356 U.S. at 103; *Furman v. Georgia*, 408 U.S. at 451 (Powell, J. dissenting), has improperly relied on the *Carolene Products Co.*, case. Professor Mason has written extensively on the now "famous footnote 4" in his work *The Supreme Court, Palladium of Freedom* (1963), and he makes it quite clear that footnote 4 has no place in this case. In explaining footnote 4, Professor Mason states:

"The second paragraph suggests that the Court might subject legislation which restricts the *political processes* (limitations on the right to vote, restraints on dissemination of information, interferences with political organization, and prohibitions of peaceable assembly) to 'more exacting judicial scrutiny.' *The underlying rationale is that the political processes can ordinarily*

*be expected to bring about repeal of undesirable legislation affecting economic and commercial relations. But interferences such as those just mentioned demand closer judicial notice, because operation of the primary control on government--the political process--is itself impeded.*

The third paragraph declares that statutes affecting particular religions or national or racial minorities might also require greater judicial alertness. Since the political protection ordinarily open is unavailable to these peculiar minorities, the Court is under the necessity of subjecting such interference to 'more searching judicial inquiry.' Paragraph two does not suggest that greater judicial scrutiny is required by the nature of the rights affected; paragraph three does. *The important consideration is whether judicial intervention is required to safeguard rights inadequately protected by normal political controls.*

It is beyond all doubt that the "more exacting scrutiny" requirements only pertain to those "preferred freedoms" -- speech, thought, religion, assembly and voting or where the legislation affects

particular religions or national or racial minorities, precisely because they are essential to the proper operation of the political processes. Louis Lusky, Justice Stone's law clerk, who according to Professor Mason, originally prepared the draft opinion, explained the footnote was:

"... a frank recognition that the Court feels special responsibility for the protection of the 'political processes,' because, unless some non-political agency intervenes, interferences with the collective mechanism may well perpetuate themselves. The Court thus performs an important part in the maintenance of the basic conditions of just legislation. By preserving the hope that bad laws can and will be changed, the Court preserves the basis for the technique of political obligation, minimizing extra-legal opposition to the government by making it unnecessary. . . . Where the regular corrective processes are interfered with, the Court must remove the interference, where the dislike of minorities renders those processes ineffective to accomplish their underlying purpose of holding out a real hope that unwise laws will be changed, the Court itself step in. . . ."

Louis Lusky, "Minority Rights and the Public Interest", 52 *Yale Law Journal* 1 (1942), 20-21.

Of course, this is why this Court properly intervened in the case of *Baker v. Carr*, 369 U.S. 186 (1962). As Professor Mason observed:

" . . . With the triumph of Justice Clark's realistic argument for judicial intervention, the American ideal of political equality came a step closer to realization. The Court functioned as an instrument of democracy and of majority rule." *Mason*, at 177.

It is patently clear that the statutes involved in this case in no way restrict the political processes from their normal operation, and Respondent fails to perceive just how they fall upon any discernible or identifiable religious, political or racial minority--save those who might be inclined to commit premeditated murder.

Respondent submits the inquiry must be whether there is a rational basis for the legislative judgment.

The death penalty serves a valid governmental interest.

After noting the traditional objectives which justify the imposition of punishment, to-wit: reformation and rehabilitation, moral reinforcement or reprobation, isolation or specific deterrence, retribution and deterrence, Petitioner blandly states without any supporting authority:

" . . . It is not enough, however, that the death penalty simply implement one or more of these goals. It must be demonstrated that this uniquely harsh punishment is better fitted to the effectuation of the permissible purposes of the criminal law than other kinds of available criminal penalties. . . ." (Pet. Br. at 122).

Respondent would point out that nowhere in Petitioner's brief does he tell us



what "available criminal penalties" would be an *acceptable* alternative to capital punishment. Naturally, Respondent assumes Petitioner is speaking of some form of life imprisonment without parole. Respondent submits that the Legislature could validly conclude life imprisonment without parole would not be adequate to deter some individuals from committing homicide in the future.

Amicus for the United States and California in the briefs submitted in *Fowler v. North Carolina* pointed out several cases wherein persons sentenced to life imprisonment subsequently escaped and killed again (Brief of United States at 45; Brief of Calif. at 95-98), and noted that even in a carefully structured prison existence, some individuals are essentially uncontrollable and likely to commit additional

violent offenses that might result in death to other inmates or prison personnel. It is respectfully submitted that in order to make life imprisonment an acceptable alternative to capital punishment for these individuals, society would have to place them in a confinement setting that itself would be cruel and unusual punishment, for they would have to be placed in solitary confinement for the rest of their lives and denied the hope of retrieving any of the incidents of a meaningful existence. *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971), *cert. denied* 405 U.S. 978 (1972), makes it evident that such treatment is constitutionally unacceptable. In a social order where liberty is cherished more than life itself, it is questionable whether the condemned individual would himself prefer "life" imprisonment over death. Surely the legislative determina-

tion that life imprisonment is not an adequate alternative is not irrational.

Petitioner next asserts that retribution "standing alone" is not a sufficient justification for the death penalty. Interestingly, Petitioner does not deny the concept, he merely asserts it is insufficient "standing alone" to justify resort to the death penalty. Respondent suggests that retribution does *not* stand alone as a basis for the imposition of the death penalty and that Petitioner underestimates its value to society as a whole. Mr. Justice Stewart in his concurring opinion in *Furman v. Georgia*, supra, clearly perceived that:

"The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal

offenders the punishment they 'deserve,' then there are sown the seeds of anarchy - of self-help, vigilante justice, and lynch law." 408 U.S. at 308

This view is supported by others studying the subject. Packer, *The Limits of the Criminal Sanction* (1968); Royal Commission on Capital Punishment, 1949-53 Report (1953); Cohn, *Reason and Law* 50 (1950); Hart, *The Aims of the Criminal Law*, 23 *Law & Contemporary Problems* 401 (1958); *Furman v. Georgia*, 408 U.S. at 453 (Powell, J., dissenting). Respondent would suggest that if society did not use the maximum penalty to express social opposition to those crimes of an extreme nature, society would become desensitized to the gravity of the act. As Professor Goodhart noted:

"[W]ithout a sense of retribution we may lose our sense of wrong. Retribution in punishment is an expression of the community's dis-

approval of crime, and if this retribution is not given recognition then the disapproval may also disappear. A community which is too ready to forgive the wrongdoer may end by condoning the crime. Goodhart, *English Law and the Moral Law* 93 (1953).

Capital punishment actually reinforces social values in that it stands as a social statement that human life is so sacred that any person who wantonly and without justification takes the life of another shall forfeit his own. As the Solicitor General so properly noted, "retribution" was the only social benefit served by the execution of Nazi leaders for war crimes which they committed and that "...[t]hat example alone should warn against the denigration of 'retribution' as a completely legitimate social response to truly heinous crimes. . . ." (Brief of United States at 41).

Petitioner next asserts that the "empirical findings" included in their Appendix

"... conclusively demonstrate, there is no credible evidence--despite the most exhaustive inquiry into the subject--that the death penalty is a deterrent superior to lesser punishments. . . ." (Pet. Br. at 127-128). It is interesting to note that Petitioner does *not* say capital punishment does not deter, he merely states it does not deter more than does life imprisonment. In any event, how Petitioner can make such a statement in the face of that evidence to the contrary is beyond Respondent's comprehension. Mr. Justice Burger quite properly noted that the participants in the debate are caught in an "empirical stalemate", *Furman v. Georgia*, 408 U.S. at 395, and that therefore the "... legislatures can and should make an assessment of the deterrent influence of capital punishment, both generally and as affecting the commission of specific types of crimes." 408 U.S. at 403.



Respondent does not wish to belabor this brief with statistical data already before this Court (See: Brief of United States at pps. 32-39; Brief of Calif. at pps. 71-103), but would note that the homicide rate in the United States and the State of Florida has risen at an alarming rate since the imposition of the *judicial* monitoriums upon the execution of death sentences.<sup>1</sup>

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<sup>1</sup> The rate of murder per 100,000 inhabitants increased 56% during the period between 1960 and 1970. Federal Bureau of Investigation, Uniform Crime Reports 1970 (August 31, 1971) at 7-8. Since 1970 the rate of murder per 100,000 inhabitants has increased another 32.9%. Federal Bureau of Investigation, Uniform Crime Reports 1864 (November 17, 1975) at 11-16. In Florida in the last five years the rate of murder per 100,000 inhabitants has increased 25.8%. Florida Department of Criminal Law Enforcement, 1974 Annual Report (April 22, 1975). Last year 20,600 people were murdered in the United States and 1,190 were murdered in the State of Florida.

The Royal Commission, after its exhaustive study of this issue, said:

"The general conclusion which we reach, after careful review of all the evidence we have been able to obtain as to the deterrent effect of capital punishment, may be stated as follows. *Prima facie* the penalty of death is likely to have a stronger effect as a deterrent to normal human beings than any other form of punishment, and there is some evidence (though no convincing statistical evidence) that this is in fact so. But this effect does not operate universally or uniformly, and there are many offenders on whom it is limited and may often be negligible. It is accordingly important to view this question in a just perspective and not base a penal policy in relation to murder on exaggerated estimates of the uniquely deterrent force of the death penalty." (Emphasis supplied)

Report of the Royal Commission, *supra*, at 24.

Petitioner argues, however, the violent behavior to which the death penalty is

now exclusively applied is less deterrable than any other human behavior. (Pet. Br. at 129). In other words, persons who commit murder are not "normal" and since only "normal" people are deterred by the death penalty, "murderers" are not deterred! Respondent concedes that the *statutory existence* of the death penalty did not deter those on Death Row. Respondent also concedes that an enforced capital punishment law will not stop murder completely and that it will not deter many who will kill in spite of its existence. Respondent respectfully suggests that there are many "normal" people who *will be* deterred. Indeed, one must only wonder at how many normal people would have been deterred from killing last year alone had it appeared likely that such rash actions would cost them their lives. Perhaps 20,600 persons would not have been murdered in this country

last year. Surely not all of those individuals who killed other human beings last year were not "normal." There is no evidence that Petitioner in this case was not "normal." Indeed, he merely has an uncontrollable urge to kill!

Respondent respectfully urges that the legislature may reasonably draw the inference that over a period of time the existence of the death penalty will *reduce* the commission of the crime of murder and that the absence of such a penalty will have an adverse effect upon the moral standards of society. Cf. *Roth v. United States*, 354 U.S. 476 (1957); *Miller v. California*, 413 U.S. 15 (1973). In the obscenity cases it was urged that there was no legitimate state interest to be served by the statutes and the empirical findings were as contradictory as the empirical

findings in the instant case. This Court in deference to the legislatures and Congress upheld the statutes on the basis that ". . . [t]he State can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards. . . ." 354 U.S. at 502 (Warren, C.J., concurring). Of relevance to the issue presented here is Justice Warren's answer to the dispute among . . . critics, sociologists, psychiatrists, and penologists. . . ." 354 U.S. 501. He said:

" . . . There is a large school of thought, particularly in the scientific community, which denies any causal connection between the reading of pornography and immorality, crime or delinquency. Others disagree. *Clearly it is not our function to decide this question.* That function belongs to the state legislatures. Nothing in the Constitution requires California to accept as truth the most advanced and

sophisticated psychiatric opinion. It seems to be clear that it is not irrational, in our present state of knowledge, to consider that pronography can induce a type of sexual conduct which a State may deem obnoxious to the moral fabric of society. *In fact the very division of opinion on the subject counsels us to respect the choice made by the State. . . .*" 354 U.S. 501-502 (Warren, C.J., concurring). (Emphasis supplied).

By like token, the respective state legislatures are not required to accept the opinions of Petitioner's authorities and due to the fact that there exists an "empirical stalemate", this Court should respect the choice made by the legislative bodies that have seen fit to reinstate capital punishment.

Whether the death penalty as a form of punishment for the commission of certain crimes is offensive to contemporary community standards is a legislative question.



Petitioner's last argument, and the one upon which he most heavily relies is *his* conclusion that the death penalty has been rejected by society because it violates the ". . . evolving standards of decency that mark the progress of a maturing society. . . ." *Trop v. Dulles*, supra, at 101. Aside from the fact that that opinion itself recognized the continued constitutional validity of the death penalty, Petitioner has failed to demonstrate that anything has transpired in the last thirteen years that has impugned the validity of the observation in 1958 that the death penalty ". . . in a day when it is still widely accepted . . . cannot be said to violate the constitutional concept of cruelty. . . ." *Trop v. Dulles*, at 99 (Warren, C. J., plurality opinion).

As evidence that the death penalty violates contemporary standards of decency,

Petitioner includes the following: (i) a worldwide trend toward the disuse of the death penalty; (ii) the reflection in the scholarly literature of a progressive rejection of capital punishment founded essentially on moral opposition to such punishment; (iii) the decreasing number of executions over the last 40 years and especially over the last decade; (iv) the small number of death sentences rendered in relation to the number of cases in which they might have been imposed; and (v) the indication of public abhorrence of the penalty reflected by the fact that executions are no longer public affairs.

This argument was thoroughly rebutted by Mr. Justice Powell in his concurring opinion at pages 437 through 442. Respondent can add little or nothing to Mr. Justice Powell's reply to the argument advanced by Petitioner except perhaps to note that sub-

sequent to the *Furman* decision, the People of California repudiated<sup>2</sup> the California Supreme Court's opinion rendered in *People v. Anderson*, Calif. 1972, 100 Cal. Rptr. 152, which held capital punishment, judged by contemporary community standards, was cruel and unusual, *People v. Anderson*, supra, at 167, and that there can be no suggestion that the legislation in question are relics of the past that have simply not been removed from the statutes books, 408 U.S. at 383 (Burger, C.J. dissenting opinion) for all 35 State statutes were re-enacted into law since 1972 as a result of *Furman v.*

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<sup>2</sup> On November 7, 1972, the People of California amended their constitution by an overwhelming majority of 67% (5,386,904 votes) so as to authorize capital punishment in that State. (See: Brief of California in *Fowler v. North Carolina*, at 37-38).

*Georgia*, supra. Respondent concurs with Mr. Justice Powell's conclusion that:

One must conclude, contrary to petitioners' submission, that the indicators most likely to reflect the public's view--legislative bodies, state referenda and the juries which have the actual responsibility--do not support the contention that evolving standards of decency require total abolition of capital punishment. Indeed, the weight of the evidence indicates that the public generally has not accepted either the morality or the social merit of the views so passionately advocated by the articulate spokesmen for abolition. But however one may assess amorphous ebb and flow of public opinion generally on this volatile issue, this type of inquiry lies at the periphery--not the core--of the judicial process in constitutional cases. The assessment of popular opinion is essentially a legislative, not a judicial, function. . . ." 408 U.S. at 442-443 (Powell, J., dissenting opinion).

Mr. Justice Blackmun correctly observed that the elected representatives of the people are ". . . far more conscious of

the temper of the times, of the maturing of society, and of the contemporary demands for man's dignity, than are we who sit cloistered on this Court. . . ." 408 U.S. at 413 (Blackmun, J., dissenting opinion), and Respondent suggests the Chief Justice was eminently correct in his pronouncement that:

" . . . in a democracy the legislative judgment is presumed to embody the basic standards of decency prevailing in the society. This presumption can only be negated by unambiguous and compelling evidence of legislative default. . . ." 408 U.S. at 384 (Burger, C.J., dissenting opinion) (emphasis supplied).

This is the very premise upon which *Baker v. Carr*, supra, was decided. If the legislative judgments are not presumed to reflect the public will, then *Baker* means nothing and might just as well never been written. Of course, history tells us otherwise.

In this respect, Respondent would point out to this Court that a select-committee of the Florida Legislature, after hearing extensive testimony throughout the State, recommended that capital punishment be reinstated and the Florida Legislature responded overwhelmingly. The bill passed the Florida House of Representatives by a vote of 116-2 with one not voting (House Journal, State of Florida, pps. 51-52, December 1, 1972), and the Florida Senate by a vote of 36-1 with two not voting (Senate Journal, State of Florida, p. 40, December 1, 1972).

Respondent would be remiss if it did not respond to Petitioner's suggestion that the death penalty is applied disproportionately to racial minorities and the poor. (Pet. Br. at 136-137). Whether that was true in the past or not is not relevant to this case. In Florida as of January 1,



1976, of the 58 persons sentenced to death, 28 were white and 30 were black.<sup>3</sup> An examination of the case files in Respondent's custody reveals that in 39 of those, the defendant was represented by the public defender and 20 were represented by private practitioners.

To adopt the argument advanced by Petitioner, which is ". . . total abolition of capital punishment by judicial fiat. . ." 408 U.S. at 421 (Powell, J., dissenting opinion), would do utter violence to . . . stare decisis, federalism, judicial restraint

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<sup>3</sup> See Appendix A.

and--most importantly--separation of powers<sup>4</sup>. . ." 408 U.S. at 417 (Powell, J., dissenting opinion). Respondent suggests it would constitute a perversion of the democratic process.

Justices Burger, Blackmun, Powell, and Rehnquist in their dissenting opinions filed in *Furman v. Georgia* were of the view that whether capital punishment per se violated contemporary community standards decency and thus violative of the Eighth Amendment to the United States Constitution

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<sup>4</sup> Article III, Section 3, United States Constitution, provides that ". . . The Congress shall have power to declare the punishment of treason. . . ." A judicial conclusion that capital punishment is cruel and unusual would purport to deny to the Congress that body's power to determine the punishment for the crime of treason which is expressly given to Congress by the Constitution.

was a legislative question and not one to be decided by this Tribunal. Each Justice relied upon long-standing principles of this Court that decisions involving social policy and public morality are not judicial functions. As this Court said in *Robinson v. United States*, 324 U.S. 282 (1944):

" . . . It is for Congress and not for us to decide whether it is wise public policy to inflict the death penalty at all. We do not know what provision of law, Constitutional or statutory, gives us power wholly to nullify the clearly expressed purpose of Congress to authorize the death penalty because of a doubt as to the precise congressional purpose in regard to hypothetical cases that may never arise." 324 U.S. at 287

Petitioner would have this Court deviate from those principles for he candidly admits:

" . . . The moral character of this debate is as significant as its prevalence. The opposition to capital punishment--frequently voiced by religious denominations,

among others--has been vigorously asserted on the basis of 'fundamental moral and societal values in our civilization and in our society.' Proponents of the death penalty have responded with equal moral fervor. Surely no other criminal sanction has evoked such passionate, ceaseless philosophical argument. . . ." Pet. Br. at pps. 118-119.

Respondent submits that what Mr. Justice White said in his dissenting opinion in *Roe v. Wade*, 410 U.S. 113 (1973), is equally relevant to the issue raised herein. Justice White said:

" . . . I find nothing in the language or history of the Constitution to support the Court's judgment. The Court simply fashions and announces a new constitutional right for pregnant mothers and, with scarcely any reason or authority for its action, invests that right with sufficient substance to override most existing state abortion statutes. The upshot is that the people and the legislatures of the 50 States are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of

possible impacts on the mother, on the other hand. As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court.

The Court apparently values the convenience of the pregnant mother more than the continued existence and development of the life or potential life that she carries. Whether or not I might agree with that marshaling of values, I can in no event join the Court's judgment because I find no constitutional warrant for imposing such an order of priorities on the people and legislatures of the States. In a sensitive area such as this, involving as it does issues over which reasonable men may easily and heatedly differ, I cannot accept the Court's exercise of its clear power of choice by interposing a constitutional barrier to state efforts to protect human life and by investing mothers and doctors with the constitutionally protected right to exterminate it. This issue, for the most part, should be left with the people and to the political processes the people have devised to govern their affairs." 410 U.S. at 221-222, (White, J., dissenting) (emphasis supplied).

See also: *Witherspoon v. Illinois*, 391 U.S. 510 (1968) (White, J., dissenting opinion at 540-542).

Professor Mason in discussing the doctrine of judicial "self-restraint" advises against judicial intervention in cases such as this, stating:

"'Self-restraint' is valuable chiefly as a warning signal. Courts enter on dangerous ground when they invade the domain of policy and, to justify their action, resort, wittingly or unwittingly, to political and social considerations, for which no support can be found in the Constitution. Unless the political process itself is under attack, the safer course is to rely on the legislature to declare public policy, and on political restraints to provide correctives. In America, adaptation of the Constitution to changed and changing conditions means, in considerable measure, the adaptation of judicial review. In a free society all governing institutions must ultimately respond to the dominant political forces of the country as revealed at the ballot box. 'In the long run,' Professor



Corwin has observed, 'the majority is entitled to have its way, and the run must not be too long either!'

Jefferson's admonition of 1821 is applicable generally--to the national government and the states, to Congress, Executive, and Court. The 'healing balm' of our Constitution, he said, is that 'each party should shrink from all approach to the line of demarcation, instead of rashly overleaping it, or throwing grapples ahead to haul to hereafter.' *Mason, supra*, at 147-148.

Respondent respectfully submits that the history of the Eighth Amendment and judicial precedents are contrary to Petitioner's position; that the opinion of the People, as best evidenced through the acts of their elected representatives, is contrary to his position; and that this Court should in the exercise of judicial self-restraint decline to override the policy decision and moral judgment of the People that the death penalty for certain heinous crimes does not violate contem-

porary standards of decency, and therefore, does not offend the Constitution of the United States.

POINT II

CAPITAL PUNISHMENT MAY LAWFULLY BE IMPOSED UNDER FLORIDA'S CRIMINAL JUSTICE SYSTEM'S PRESENT PROCEDURES SAID PROCEDURES BEING EITHER REQUIRED OR PERMITTED BY THE CONSTITUTION OF THE UNITED STATES AND THE CONSTITUTION OF THE STATE OF FLORIDA.

Shortly after this Court's opinion in the now well-known decision of *Furman v. Georgia*, supra, Florida's Legislature, obviously responding thereto, enacted Chapter 72-724, Laws of Florida, recreating capital punishment in Florida. That law became effective on December 8, 1972.

Since that time, some 67 individuals are presently housed on death row in Florida's penitentiary at Raiford. An unknown number of others, whose penalties (originally death) having been reversed

by the Florida Supreme Court, are in some other form of state custody. In a surprising number of all the appeals from initial death judgments, arguments similar to those made here have been made by or on behalf of some of the defendants. The Florida Supreme Court has yet to write an opinion bearing thereon. So it is that although Florida's highest court has not spoken to the matter, they have surely had it put before them on more than a few occasions.

It is also interesting to note that at no time in Florida's history prior to either this Court's decision in *Furman v. Georgia*, supra, or the passage of Chapter 72-724, supra, was this argument ever presented to any court in Florida.

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Petitioner contends the imposition of the death penalty in Florida, within its current criminal justice system, violates either the Eighth Amendment of the Constitution of the United States directly as cruel and unusual punishment (see argument *ante*), or tangentially the Fifth and Fourteenth Amendments (we would suppose upon a claim of an absence of due process) because:

(1) the prosecutor (in Florida the state attorney-see Chapter 27, Florida Statutes) has unbridled discretion with regard to the bringing of criminal charges;

(2) the jury has the unbridled right to return all verdicts from the most



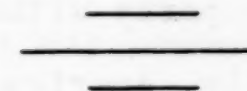
severe (death) to the least severe (acquittal);

(3) there is unbridled discretion in the sentencing procedure pursuant to Florida's §921.141, Florida Statutes; and

(4) the ultimate in grace (executive clemency) is as well unbridled and therefore contributes to the constitutional infirmity.

Petitioner does not suggest that if this alleged unbridled discretion were removed such a system would either be desirable or optimum. That should not come as a surprise to anyone. Indeed, if that were the case, this nation would have stepped backwards into a judicial system not unlike that of the Medes and the Persians. Yet if his argument bears the ring of truth and proves

persuasive, that is the only possible result for indeed if any discretion works the least untoward hardship on even one soul, it is as infirm as though it had done so to all. Thus, if it is properly excised only the absence of discretion can insure the absence of any excesses or deficiencies.



Even more to the point is the obvious fact that Petitioner does not discuss whether his complaint regarding the alleged infirmities in Florida's criminal justice system in capital cases is peculiar to those cases alone. It is well that he does not because even the most ordinary extrapolation of his complaint would of needs reveal quickly that the alleged infirmities in death cases is repeated many, many times

over in all criminal justice systems in all jurisdictions in all cases less than capital.

As we understand what is really a rather simple provision known as the Fifth Amendment to the Constitution of the United States, its only admonition (appropriate here) is that no person may be deprived of life, liberty or property without due process of law. Historically, America's courts have been so depriving people (hopefully) with due process of law--and well within the bounds of the very system Petitioner suggests is infirm when elevated to the level of death cases, for some 199 years. The upshot of all this is quite simply that if the Fifth Amendment to the United States Constitution makes no distinction regarding life, liberty or property, and carries as its only admonition that they shall not

be taken without due process, then surely the alleged failure of the system suggested by Petitioner with regard to his and, we suppose, other death cases, pervades the entire system. Indeed, is there anything that can be taken from a human other than his life, liberty or his property? Depending upon how persuasive his argument may become when considered by this Court, it may safely be said that if it does not fall on deaf ears then the outlook for America's system of justice is decidedly grim.

Remembering that this Court's decision in the case of *McGautha v. California*, 402 U.S. 183, certainly admits that some discretion is quite permissibly a part of the process of determining who is to be executed, we wonder at why that sound

principle would not still obtain. Surely nothing written by this Court in *Furman v. Georgia*, supra, upset that conclusion in any way.

Terminally, we observe that none of the areas to be discussed *post* in this division of Respondent's brief regarding the certain levels of allegedly offensive discretion, had their birth in Florida legislative enactments that had anything to do with the question of capital punishment as it has recently developed in this Court. In short, state attorneys, juries, sentencing judges and chief executives were virtually always empowered to do the very things Petitioner suggests for the first time are infirm. With this in mind, your Respondent addresses the four areas of alleged discretion as

follows:

### Prosecutorial Discretion

We are told by Petitioner that the initial infirmity stems from the fact that the prosecuting official in the state of Florida (State Attorney--see Chapter 27, Florida Statutes), some twenty (20) in number, has an unbridled right in selecting which cases should be placed upon trial, bargained out, pleas accepted to, *nolle prosequies* entered, and no charges filed. He points us to a host of authorities in support of these propositions. All of that is quite unnecessary since Respondent readily admits the latitude extended the several state attorneys. In this regard, there is not ten cents worth of difference between Florida's state attorneys' latitudes and those of the several United States



attorneys. See *United States v. Cox*, 342 F.2d 167 (C.A. 5), cert.den. sub nom.; *Cox v. Hauberg*, 381 U.S. 935; *In re. Grand Jury January, 1969*, 315 F.Supp. 662 (D.Md.)

Insofar as the matter applies to Petitioner's situation (the only one with which we should be concerned), we must insist that the state attorney has absolutely no control over whether a given individual in Florida is indicted for a capital crime.

Grand juries in Florida (Ch. 905, F.S.) are not required to rely upon the state attorney's conclusion regarding a capital case. They are free to investigate on their own any matters brought to their attention by anyone or, for the matter of that, about which they have or acquire personal informa-

tion. They may return an indictment without regard to the views of the state attorney and the court (circuit court) may not dispose of indictments so returned except as the result of assaulting pleadings by either of the parties. So it can be seen that it is not accurate to contend that the state attorney controls who shall be indicted for a capital crime in Florida. Remembering that he serves the grand jury as its legal adviser only if and when they want him to, it is difficult to imagine how he could prevent the return of an indictment for a capital crime.

Rather than assign to the several state attorneys any malicious control of the kind suggested by Petitioner, it must be assumed that those who are in fact indicted are those who should have been indicted, and

those who are not, of course, should not have been indicted. Unless and until there is any evidence whatsoever to show any pattern contrary to appropriate disposition, such speculation by Petitioner ought to merit nothing more than this Court's instant rejection.

We also agree that the prosecutor can terminate most, if not all prosecutions by the simple entry of an order *nolle prosequi*. We wonder at what it is Petitioner means to convey by this observation. The state attorney so doing has either done so appropriately or he lays himself bare to rejection by the electorate or removal by the governor. Unless we assume that state attorneys in Florida, and in particular the state attorney in

this cause (the Honorable E. J. Salcines), arbitrarily and capriciously sought the indictment against Petitioner, there seems little need to consider whether such results are philosophically possible. The simple fact that we must concede that human excesses or deficiencies are among us, does not in any sense of the word justify that as a compelling basis to conclude that the whole spectrum of Florida's prosecutorial imput is infirm under this Court's decision in *Furman v. Georgia*, *supra*.

Petitioner advises us that the state attorney may contract with a criminal for an exemption from prosecution, citing as authority therefor the case of *Ingram v. Prescott*, 111 Fla. 320, 149 So. 369 (Fla. 1933). He is accurate as to what the law used to be. Immunity from prosecution

today is a statutory creature which narrowly prescribes the circumstances in which it can and should be granted. See §914.04, Fla.Stat. Respondent does not mean to suggest that simply because it is now a creature controlled by statute that the grant or withholding of immunity cannot be abused but simply observes that what may have been a private arrangement at the time of the decision in the case of *Ingram*, supra, is now a rather public activity made the object of legislative control.

We are told that the state attorney is free to plea bargain and may therefore accept pleas to lesser offenses when it is appropriate. We would hope that plea bargaining is not removed from the scene of the criminal justice system. While it

may not be accurate that a full ninety (90%) percent of all criminal cases are disposed of in that fashion, it is certainly safe to say that more than seventy-five (75%) percent of them are. How wise that decision is turns upon a question of the wisdom of the several parties involved rather than on any suggestion of abuses or guile being practiced by the state attorney. In any case, all plea bargaining in Florida is done with the three principals involved. That is to say, the court, the state attorney and the defendant by and through his counsel who by virtue of this Court's decision in the case of *Gideon v. Wainwright*, 372 U.S. 335, 9 L.ed.2d 799, 83 S.Ct. 792, is vouchsafed to all defendants who may not be able to afford one. The presumption must follow that if a bargain has



been struck with regard to a plea, it is one which bears the imprimatur of legitimacy rather than the veil of evil. See Rule 3.171, Rules of Criminal Procedure, Vol. 33, F.S.A.

Petitioner seeks to make of plea bargaining something less than desirable by suggesting that the control exercised by the court is really unimportant since a defendant has a right to plead guilty. What he ought to tell this Court is that a defendant has a right to plead guilty only to the actual charge leveled against him by the indictment or information. His plea of guilty to any offense less than that must be one in which all three parties agree.

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Petitioner next tells us that the state attorney may not actively seek the death penalty in a given case by (we suppose) not being aggressive enough during the sentencing procedure and perhaps never mentioning death itself as the ultimate sanction that he seeks. Undoubtedly this can occur without regard to whether Mr. Justice White in his special concurring opinion in *Furman v. Georgia*, supra, said so. Once again we ask why the presumption of skulduggery? Is Petitioner suggesting either that Mr. Salcines or other state attorneys in Florida have done so as to other capitally indicted defendants and not him; or is he simply saying because it conceivably could occur that his judgment must be set aside? We really do not know what he means by his remarks. What we do know is if he does not

mean the former, he ought not to be heard to complain about the latter.

Added to the above is the fact that state attorneys in Florida no longer enjoy unbridled discretion with regard to whether they file an information against someone charged less than capitally. This is so because the Florida Supreme Court in *In re. Rule 3.131(b), Florida Rules of Criminal Procedure*, 289 So.2d 3 (Fla. 1974), promulgated a rule which requires that each state attorney, before he signs an information, be certain that he can prove his case beyond and to the exclusion of every reasonable doubt. Accordingly, he is now restricted to the degree above discussed. It is of no consequence that the Rule does not apply to capital cases because the state attorney,

as we have discussed *ante*, does not file informations charging capital crimes. That comes only from a grand jury indictment.

#### Jury Discretion

We are next told that the jury has the unbridled right to return an ultimate verdict ranging all the way from death to acquittal. Obviously this would include the several conceivably possible verdicts of all lesser offenses embraced within the charge. This too seems to have been given some evil connotation by Petitioner. We wonder why since that is an infirmity which inheres in every criminal case ever tried in this country without regard to whether it may be capital or otherwise. If he is suggesting that by the latitude given the jury as the fact finder, they can upset the

criminal justice system by abusing their prerogatives, then indeed he indicts the entire jury system. Unless we are able to penetrate the minds of the several million juries which have undoubtedly sat through this nation's 199 years, there is no way to know that in fact this result has ever obtained. It well may be that it is prevalent. Your Respondent will not be as quick to speculate yea or nay as is Petitioner. Their area of discretion (in capital cases) is quite obviously open to the almost immediate review of the trial judge. That, in turn, is open to the review of the Supreme Court of the State of Florida during the appellate process. The Florida Supreme Court's decision is open to the review of this Court by Petition for Writ of Certiorari or any other appropriate pleading

in light of this Court's decision in *Furman v. Georgia*, supra. That seems to your Respondent a rather substantial barrier between the type of unbridled discretion perhaps properly condemned in *Furman* and an appropriate set of circumstances within which a death penalty may legitimately be imposed in this day and time.

Petitioner next complains that the distinction between felony murder at the first and second degree levels is, despite the opinion of the Supreme Court of Florida in the case of *State v. Dixon*, 283 So.2d 1 (Fla. 1973), indistinguishable. Why? The obvious difference between first and second degree murder is encompassed in the words appropriately quoted by Petitioner:



first degree "engaged in" -- and second degree "perpetration of". Without regard to whether one reads the dissenting opinion of Mr. Justice Boyd in *Dixon*, supra, or that of the majority, it is apparent that what the Legislature intended in that distinction is that the trigger man is the individual "engaged in" and should be tried as an individual having committed murder in the first degree, while the driver or lookout man, who was only involved in the "perpetration of" the felony which produced the murder, should not be treated as though he had committed first degree murder. Historically no thinking person would quarrel with the proposition that juries have always been reluctant to assess as much criminal responsibility against a mere look-out as they do against the physical perpetrator of

the felony killing. The Florida Legislature recognized this in writing their statute as they did, and the Florida Supreme Court acknowledged that it was the legislative intent and indeed is a valid distinction.

Petitioner seeks to counter this by suggesting that juries can convict for lesser offenses and thereby avoid the nice distinctions about which lawyers and judges speak. Once again we ask when have they not been able to do so even though the criminal charge was one founded upon basic English and in no wise complex?

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Petitioner next tells us that the entire system suffers from yet another infirmity. That is to say that he can request instruc-

tions regarding lesser and included offenses even though there is no evidence thereof and by so doing secure in effect a jury pardon. As authority for this he refers to the cases of *Little v. State*, 206 So.2d 9, 10 (Fla. 1968); and *Bailey v. State*, 224 So.2d 296, 299 (Fla. 1969). In this regard Petitioner would have been accurate until the Florida Supreme Court rendered its decision in *Gilford, et al. v. State*, 313 So.2d 729 (Fla. 1975). That decision fully and finally put to bed the matter of securing charges with regard to offenses not traceable to any evidence presented in the cause by concluding "No evidence; no charge". That is no longer a viable complaint by any litigant in Florida if he means to suggest that the system suffers by a potential hazard created thereby.

Even if this were not so, such a Rule would of necessity have to be an appropriate conclusion because to hold otherwise would be to permit anyone (at least in Florida) from requesting instructions on lesser offenses possibly included even though there is absolutely no evidence bearing thereon so as to permit a jury to return what would amount to an impossible verdict. This would surely fly into the teeth of the general principle condemned by this Court in *Furman v. Georgia*, *supra*.

#### Sentencing Discretion

Petitioner next complains that the sentencing procedure outlined by §921.141, F.S., is precious little, if indeed any, better than that which existed pre-*Furman v. Georgia*. He quotes rather extensively from a dissenting opinion of Mr. Justice Ervin

in *State v. Dixon*, supra. The sentencing procedure in Florida was designed with the hope of meeting the complaint of this tribunal in its decision in the case of *Furman v. Georgia*, supra. It would be foolish to suggest that the trial judge does not make the final determination as to life or death. Quite obviously he does. He is required, however, to state in a detailed writing the reasons for which he arrived at his conclusion of death as the appropriate sentence so that it, in turn, when measured by the Florida Supreme Court on appeal against all others capitally convicted as well as the evidence in the particular case can be properly assessed in order to determine whether it meets what some believe to be the test enunciated in *Furman v. Georgia*, supra.

In any case, we invite the Court's attention to the fact that both the jury and the judge in this case recommended Petitioner be sentenced to death. The Florida Supreme Court agreed that the posture of his sentence when measured against others and the general principles of *Furman v. Georgia*, supra, was a proper one. Ultimately, this Court must itself measure the decisions of the courts of last resort of the thirty-odd states which have retained capital punishment in determining whether the new aggregation is acceptably less discriminatory than it was at the time *Furman v. Georgia*, supra, was written.

We are told that the statute does not advise the trial judge what weight he is to give to the jury's recommendation. Truly



it does not, just as no legislation can tell a judge how he is to weigh matters within his exclusive pale. We do not suffer an invasion of the judiciary by the legislative branch. He says that because the jury is not required to write out its reasons for recommendation, the judge has nothing to which he can turn. How absurd. He has set with the jury through the entire sentencing proceeding and has heard it all. In this particular case, we are not confronted with an overriding of a recommendation of mercy, but rather unanimity as between the jury and the trial judge in concluding that death was the appropriate sentence. In this case not even one mitigating circumstance was found as opposed to four aggravating circumstances. What a fiction would have to be indulged in order for rational people to

conclude that this was a willy-nilly disposition either by the jury or the judge or the Florida Supreme Court. How much more must there be before complaints such as this will be quickly put aside as nothing more than a human who is dissatisfied with his plight?

It is true that different juries and different trial judges may produce different results based on similar evidence in several cases across not only Florida but this nation.

With regard to Florida, the Florida Supreme Court is the terminal repository which must measure any such discrepancies as against the history of those theretofore sentenced. With regard to the nation at large, this Court is the ultimate repository which must make that

determination. An I B M type of computer result has never been persuasively argued as the appropriate grail of any criminal justice system. If it is, then we have no need for juries or judges, but rather a mechanical device by means of which facts can be fed in and retrieved quickly and uniformly without regard to those things by which we routinely function in the ordinary pursuit we call life. Mercy would not be a human grace nor would death be a human excess. They would simply be digits in a system. If this is the consummation Petitioner so devoutly wishes, then better minds than ours would have to put it together and provide for its implementation.

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Petitioner finds yet another believed informity in the fact that appellate review is unguided by statutory restrictions such as would more nearly satisfy him.

We have never understood that what this Court said in *Furman v. Georgia*, supra, required any legislative attempt to write the impossible guidelines for the nation's judiciary. The Florida Supreme Court sits in the best position to determine from all its death cases what disposition should be made of incoming death cases so as to see that they square not only with each other in terms of severity or grace, but as well whether the aggregation would meet the test believed set by this Court in *Furman v. Georgia*, supra. More than that cannot be done and should not be expected.

Petitioner complains that this process does not take into account those defendants whose lives have been spared at the trial court level. We agree that it does not, yet we must urge that the presumption which must follow is that both the jury and the trial judge acted appropriately within legal bounds and returned not only a proper verdict but as well a proper sentence. To do otherwise would be to mix grapefruit with oranges on the theory that the Supreme Court of the State of Florida must review as well cases not within the jurisdiction (life sentences) only to see if by comparison the results in cases which are in their jurisdiction (death cases) are more nearly proper. That would necessarily require an assessment of impropriety against both the jury which returned the life recommendation and the

judge who agreed therewith. We do not consider that any comparison beyond that of all other death cases must be made in order to meet the basic tenants of regulated discretion seemingly approved by *Furman v. Georgia*, supra.

#### Executive Clemency

Petitioner now complains that executive clemency in Florida is as well legislatively unfettered and that because it is there is the possibility that the executive branch of Florida's government could arbitrarily bestow executive grace in the form of a pardon upon some capitally convicted defendants and not upon others.

Is Petitioner telling us that the Florida Cabinet, since this Court's decision in *Furman v. Georgia*, supra, has granted any



pardons to capitally convicted defendants arbitrarily and capriciously while withholding it from others? Is he even telling us that a pardon has ever been granted in the State of Florida by the executive branch of government to any capitally convicted defendant arbitrarily and capriciously while withholding the same from others arbitrarily and capriciously?

With the recent example of President Ford's pardon of former president Nixon as the best reminder of the fact that executive grace is unreviewable, we wonder what it is Petitioner means to say. If no one can review the President's grant of pardon to Mr. Nixon, then surely no criminal defendant in Florida or indeed the rest of the nation should enjoy a better position.

Petitioner refers to a twenty-five (25%) percent executive clemency rate found as a result of the study *Executive Clemency in Capital Cases*, 39 N.Y.U. L.Rev. 136, 191 (1964). Without regard to the accuracy of that writing, it is meaningless unless and until we determine that the executive branch of government cannot grant clemency without (1) said grant being subject to judicial review, and (2) without determining that the subjective basis upon which clemency may have been granted in Florida was arbitrary or capricious or both.

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Having demonstrated that the positions advanced by Petitioner under this division of his argument, whether measured on *Furman's*

scale or that of any other rational thought process are lacking in any merit whatever, it follows the matter should be resolved favorably to your Respondent.

### POINT III

SECTION 921.141, FLA.STAT., PRESCRIBING THE METHOD AND MEANS OF DETERMINING THE PENALTY TO BE IMPOSED IN A CAPITAL CASE, DOES NOT VIOLATE THE CONSTITUTION OF THE UNITED STATES UNDER THE DECISION OF *FURMAN V. GEORGIA*, SUPRA.

In *Furman v. Georgia*, supra, this Court reversed the death sentences imposed upon William Furman and Lucious Jackson. This Court *did not* do so on the grounds that the death sentence was "cruel and unusual" *per se*, nor did it conclude that the death sentence was "cruel and unusual" as applied to the facts and circumstances of the cases then being considered. The Court's action was rather based upon the conclusion that "the system" itself was unconstitutional because it conferred upon the juries and/or judges the power to

arbitrarily and indiscriminately sentence a person to death or to life imprisonment and that experience demonstrated juries did so "whimsically and freakishly." The system, according to the majority of the Justices, allowed the fact finder to impermissibly discriminate against certain individuals and thus constituted a deprivation of equal protection implicit in the prohibition of the cruel and unusual punishment provision of the Fourteenth Amendment to the United States Constitution.

The "system" condemned, of course, was Georgia's statutory provision authorizing the jury to recommend mercy unaided by any instructions and not subject to judicial review in any way whatsoever. Florida's system was the same. *Thomas v. State*,

92 So.2d 621 (Fla. 1957); *State of Florida ex rel. Jimmie Lee Thomas v. Culver*, 253 F.2d. 507 (5th Cir. 1958); *Baker v. State*, 225 So.2d 327 (Fla. 1969). Moreover, the system was a unitary one meaning guilt and punishment was decided on evidence which was only admissible in determining guilt. *Craig v. State*, 179 So.2d 202 (Fla. 1965) cert. den., 383 U.S. 959 (1966); and *Campbell v. State*, 227 So.2d 873 (Fla. 1969). This system prevented the jury from ever receiving information about the defendant which was obviously relevant to any intelligent disposition of the issue. *Williams v. New York*, 337 U.S. 241 (1949); *Craig v. State*, supra. It is not surprising that sentences determined under the "system" condemned by *Furman* produced uninformed, irrational, and freakish results. It is



respectfully submitted, however, that the arbitrary and irrational results are the results of the "system" by which they were determined rather than by the attitudes of the persons determining the sentences. The legal "system", was not a "system" at all! It had none of the attributes of a "system" designed to achieve any degree of uniformity. Indeed, the "system" was such that the ultimate question was presented to twelve citizens without any guidance whatsoever who were told that they and they alone could determine the question within their unbridled and unfettered discretion. Such a method is about as rational as submitting the issue of the defendant's *guilt* to a jury without instructing them as to applicable law and letting them wonder in utter speculation as to whether the accused

committed any "crime". Such was the system which was finally found wanting by this Court because it conferred upon juries and/or judges the power to indiscriminately sentence a person to death and *actual experience* has demonstrated contradictory sentences were returned in cases involving similar crimes.

In response to this judicial action, the Florida Legislature enacted §921.141, F.S., which materially altered the "system" by providing that the jury would recommend to the trial judge the sentence to be imposed. It further provides that a separate hearing be held wherein matters relevant, but inadmissible at the guilt stage of the trial, could be introduced. Ch. 72-724, §9, *supra*. This, of course, allows the receipt of evidence necessary to make an intelligent

decision on the subject. After hearing all of the evidence, the jury is required to render an advisory sentence to the trial judge based upon the existence of aggravating and mitigating circumstances enumerated in §921.141, supra. (Pet.Br. 5,6,7) The trial judge is then required to consider and weigh the aggravating and mitigating circumstances and impose sentence notwithstanding the recommendation of a majority of the jury. §921.141(3), F.S. The judgment and sentence of death are then subject to automatic review by the Supreme Court of Florida, §921.141(4), F.S.

It is respectfully submitted that §921.141, supra, cannot be condemned on the basis of *Furman*, supra. It is also suggested that it must be upheld unless our entire system of criminal justice is to be

condemned and abandoned. This is true, notwithstanding the fact that the Legislature refused to eliminate the element of mercy in the imposition of punishment. It is obvious that the Legislature agreed with Mr. Justice Blackmun that such legislation would be "...regressive and of an antique mold...." 408 U.S. at 413 (Blackmun, Jr. dissenting) and refused to consider themselves presented with the extreme and inflexible alternatives, 33 L.ed.2d at 440, of no death penalty or a mandatory death penalty. This is undoubtedly true since even under a mandatory death penalty statute, jury nullification would still be possible. Moreover, Justice Burger in his dissenting opinion made it clear that other alternatives were available, 33 L.ed.2d at 442, for he said:

"...Since the two pivotal concurring opinions turn on the assumption that the punishment of death is now meted out in a random and unpredictable manner, legislative bodies may seek to bring their laws into compliance with the Court's ruling by providing standards for juries and judges to follow in determining the sentence in capital cases or by more narrowly defining the crimes for which the penalty is to be imposed. . . ." 33 L.ed.2d at 442.

Of course, this is precisely what the Florida Legislature has done and in the absence of historical data demonstrating the new procedure ineffective or incapable of eliminating "freakish" results. Respondent is at a total loss as to just how the Petitioner could conclude that the newly created Florida system violates *Furman v. Georgia*, supra. It is submitted that this conclusion can only be predicated on a presumption that juries will not give obedience

to their oath and are incapable of applying instructions given to them by the court. Such an opinion is a terrible indictment of the American system of trial by jury and the citizens that are called upon to serve as jurors. More importantly, it is contrary to this Court's assessment of the character of the average jury. See: *Frazier v. Cupp*, 394 U.S. 731 (1960). Lastly, if the premise is true, then verdicts of guilt are infected with the same vice and the entire system of criminal justice is illegal and unconstitutional!

Certainly there will be cases where the results reached are contradictory, but that does not mean the system is unconstitutional. This is characteristic of our criminal justice system which has been



found acceptable. *Williams v. Illinois*, 399 U.S. 235, 243 (1970), citing *Williams v. New York*, supra. Absolute uniformity of punishment is not mandated for the obvious reason that it cannot be achieved by mere humans. It is childish foolishness to think that we can achieve perfection here on earth.

The Florida Legislature provided standards to guide the jury in making an informed decision and recommendation. We must presume application thereof will reduce the disparity of sentences unless and until there is *evidence* to the contrary, which is what this Court did in *Furman* itself. The Florida Legislature realizing that "...a proper sentencing decision calls on expertise which a jury cannot possibly be expected to bring with it to trial, nor

develop for the one occasion on which it will be used...." A.B.A. Project on Minimum Standards for Criminal Justice, *Standards Relating to Sentencing Alternatives and Procedures*, at p. 46, required the trial judge to impose the sentence, a clearly constitutional method of deciding the sentence to be imposed. *Williams v. New York*, supra. This provision alone will eliminate the possibility of different juries reaching different verdicts in criminal cases involving similar facts and circumstances, such as happened under the condemned "system". Appellate review by the Supreme Court of Florida will insure substantial equality of sentences to persons similarly situated. Indeed, this is why the American Bar Association, the Attorney General of the State of Florida,

and the Governor of the State of Florida have advocated appellate review of sentences in noncapital criminal cases.

It is respectfully urged that the Legislature has successfully met the challenge and has created a "system" which sufficiently limits the ability of juries and judges to arbitrarily and capriciously impose the supreme penalty, at least to the extent that this is *humanly* possible.

Petitioner attacks the due process application of the Fourteenth Amendment basically on the principle that the sentencing procedures of Florida permit the exercising of discretion by the trial judge and that the required appellate review of death sentences provided no meaningful protection from the arbitrary imposition of the death

penalty.

The term "discretion" in and of itself is not prohibited by due process. It is only when discretion is exercised in an arbitrary and capricious manner that gives rise to a due process violation. For as long as the discretion is exercised within rules and principles of law, discretion or reasoned judgment is as much a part of the judicial system of this country as the right to trial by jury.

That a trial judge may exercise his discretion in the imposition of the death penalty has been clearly faced by this Court in *Williams v. New York*, *supra*, and *Williams v. Oklahoma*, *supra*.

In *Williams v. New York*, *supra*, this Court in affirming the death sentence of a

trial judge, notwithstanding the jury's recommendation of a life sentence, and finding that a sentencing judge could exercise wide discretion in the source and type of evidence used to assist him in determining the extent of punishment to be imposed, said:

"Tribunals passing on the guilt of a defendant always have been hedged in by strict evidentiary procedural limitations. But both before and since the American colonies became a nation, courts in this country and in England practiced a policy under which a sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law." 93 L.ed. 1337 at 1341

And this Court again in *Williams v.*

*Oklahoma*, supra, turning to the concept of *Williams v. New York*, supra, said:

"But we go on to consider this Court's opinion in *Williams v. New York*, 337 US 241, 93 L.ed 1337, 69 S Ct 1079. This Court there dealt with very similar contentions and held that, once the guilt of the accused has been properly established, the sentencing judge, in determining the kind and extent of punishment to be imposed, is not restricted to evidence derived from the examination and cross-examination of witnesses in open court but may, consistently with the Due Process Clause of the Fourteenth Amendment, consider responsible unsworn or 'out-of-court' information relative to the circumstances of the crime and to the convicted person's life and characteristics." 3 L.ed 2d 516 at 521

The Florida Supreme Court in *State v.*

*Dixon*, supra, Florida's first case interpreting the new death penalty statutes, specifically held that that discretion of the trial judge in determining what evidence might be relevant to the sentence was not unbridled. *Dixon*, supra at 7.



The Florida Supreme Court imposing further restrictions on the discretion of the trial judge in imposing the sentence found that the requirement that the trial judge justify his sentence in writing, said:

"The fourth step required by Fla. Stat. § 921.141, F.S.A., is that the trial judge justifies his sentence of death in writing, to provide the opportunity for meaningful review by this Court. Discrimination or capriciousness cannot stand where reason is required, and this is an important element added for the protection of the convicted defendant. Not only is the sentence then open to judicial review and correction, but the trial judge is required to view the issue of life or death within the framework of rules provided by the statute."  
283 So.2d 1 at 8

#### Interpretation of Language of Statute

Petitioner argues that the language utilized by the Florida Legislature in establishing guidelines to be used by

the trial court and the trial jury in determining the sentence to be imposed, used language that created uncertainty in the use of the words "heinous", "sufficient", "great", "many", "extreme", or "substantial"; and alleges further that it would be unrealistic to suggest that reasonable men would not or could not differ in an understanding of the language used.

In *State v. Dixon*, supra, the Florida Supreme Court went to great length in defining and establishing guidelines to be followed by the Florida trial courts in interpreting the language of the statute. (283 So.2d at 9).

This Court in upholding a death sentence imposed for the crime of kidnapping, where a petitioner for writ of certiorari attacked

the indefiniteness of the language used in *Robinson v. United States*, supra, said:

"Nevertheless it is argued that the death penalty proviso should be held invalid on the ground that there is uncertainty as to the precise meaning and scope of the word 'unharmed' and the phrase 'liberated unharmed.' In most English words and phrases there lurk uncertainties. The language Congress used in this Act presents no exception to this general truth. One thing about this Act is not uncertain, and that is the clear purpose of Congress to authorize juries to recommend and judges to inflict the death penalty, under certain circumstances, for kidnappers who harmed their victims. . . ." [emphasis supplied]  
89 L.ed. 944 at 947

Respondent submits that Petitioner's argument that the Florida statute, by its language, does not provide sufficient guidelines in determining the aggravating and

mitigating circumstances to be considered by the sentencing jury cannot now be given consideration by this Court as Justice Black said in *Robinson*, supra, "one thing about this act is not uncertain, and that is the clear purpose of Congress (Florida Legislature) to authorize juries to recommend and judges to inflict the death penalty under certain circumstances."

In following its original interpretation of the terms, as used in the statute, as established in *State v. Dixon*, supra, the Florida Supreme Court has reduced the death penalty imposed by the trial judge in five instances.<sup>5</sup> Each of these cases, with

<sup>5</sup> *Slater v. State*, 316 So.2d 538; *Swan v. State*, 322 So.2d 485; *Halliwel v. State*, 323 So.2d 557; *Tedder v. State*, 322 So.2d 908; *Thompson v. State*, Case #35,107, 1/21/76, not yet reported.

the exception of *Slater v. State*, reduced the death penalty to life imprisonment upon a weighing of the aggravating and mitigating circumstances.

In *Dixon*, supra, the court said:

"...Review by this Court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great." 283 So.2d 1 at 10.

In this Court's decision in *McGautha v. California*, supra, expressing the opinion of five members of the Court it was held that the absence of standards to guide the

jury's discretion in determining whether to impose or withhold the death penalty did not violate due process it was said:

"Petitioners seek to avoid the impact of this history by the observation that jury sentencing discretion in capital cases was introduced as a mechanism for dispensing mercy--a means for dealing with the rare case in which the death penalty was thought to be unjustified. Now, they assert, the death penalty is imposed on far fewer than half the defendants found guilty of capital crimes. The state and federal legislatures which provide for jury discretion in capital sentencing have, it is said, implicitly determined that some--indeed, the greater portion--of those guilty of capital crimes should be permitted to live. But having made that determination, petitioners argue, they have stopped short--the legislatures have not only failed to provide a rational basis for distinguishing the one group from the other, cf. *Skinner v. Oklahoma*, 316 US 535, 86 L. Ed 1655, 62 S Ct 1110 (1942), but they have failed even to suggest any basis at all. What-



ever the merits of providing such a mechanism to take account of the unforeseeable case calling for mercy, as was the original purpose, petitioners contend the mechanism is constitutionally intolerable as a means of selecting the extraordinary cases calling for the death penalty, which is its present-day function.

"In our view, such force as this argument has derives largely from its generality. Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by the history recounted above. To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability."

\* \* \*

"In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or

death in capital cases is offensive to anything in the Constitution. The States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider a variety of factors, many of which will have been suggested by the evidence or by the arguments of defense counsel. For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete."

\* \* \*

"Before we conclude this opinion, it is appropriate for us to make a broader observation than the issues raised by these cases strictly call for. It may well be, as the American Law Institute and the National Commission on Reform of Federal Criminal Laws have concluded, that bifurcated trials and criteria for jury sentencing discretion are superior means of dealing with capital cases if the death penalty is to be retained at all. But the Federal Constitution, which marks the limits of our authority in these cases, does not guarantee trial

procedures that are best of all worlds, or that accord with the most enlightened ideas of students of the infant science of criminology, or even those that measure up to the individual predilections of members of this Court. See *Spencer v. Texas*, 385 US 554, 17 L Ed 2d 606, 87 S Ct 648 (1967). The Constitution requires no more than that trials be fairly conducted and that guaranteed rights of defendants be scrupulously respected." 28 L.Ed.2d 711 at 724

Petitioner recognizes (Pt.Br. 56) that Art. V §3(b)(1) of the Florida Constitution requires that the Supreme Court of Florida *shall* hear appeals imposing the death penalty. Respondent is at a loss as to exactly what Petitioner complains of. Does Petitioner now contend that Florida's Constitutional provision, requiring State Supreme Court review of all death penalties to be unconstitutional under *Furman*.

Respondent thinks not. Does Petitioner then assert that all cases, involving at their outset capital punishment even though the final decision of these cases in the trial court do not reach that proportion, be reviewed *only* by the Supreme Court? Respondent thinks not. Certainly Petitioner does not intend to imply that all appellate review of criminal cases is not reported in the reporter system and available to all of the courts of Florida for their consideration in reaching subsequent appellate decisions both as to trial procedures and to penalty provisions. It would be facetious to argue to this Court that appellate counsel arguing a death sentence on appeal to the Supreme Court of Florida, would not include in his argument all cases determined by the Florida appellate courts,

whether it be the Supreme Court of the state or one of the state district courts of appeal, which would have any bearing, factually or in law on the then pending decision. Certainly appellate review must be had and is had.

The burden placed upon the Supreme Court of Florida by §921.141, supra, and the Florida Constitution requiring review of death penalties is best expressed and recognized by the Florida Supreme Court in its opinion in *Dixon*, supra, as previously quoted (283 So.2d 1 at 10), and Respondent submits that a close analysis of the nineteen opinions of the Supreme Court, spoken to by Petitioner (Pt. Br. 59) cannot be found lacking in explanation as to why the death penalty was either affirmed or reduced in that particular case.

Respondent respectfully submits that as Florida's death sentence statute matures with age that the reasoned judgments as reached in each particular case will solidify the boundaries within which the death penalty will either be affirmed or reduced.

Actual trial procedures as they exist in Florida--in the absence of the imposition of the death penalty--are first reviewable in the district courts of appeal and certainly Petitioner makes no assertions herein that such appellate procedure is not adequate. It is only the sentencing procedures--where death is imposed--of which he now complains. Final review of the death sentence required by §921.141, supra, has been found by the Florida Supreme Court in



*Dixon*, supra, to be an additional safeguard for those upon which the death penalty is imposed to assure that an unequal administration of justice does not occur. The Florida Supreme Court said:

"Review of a sentence of death by this Court, provided by Fla.Stat. § 921.141, F.S.A., is the final step within the State judicial system. Again, the sole purpose of the step is to provide the convicted defendant with one final hearing before death is imposed. Thus, it again presents evidence of legislative intent to extract the penalty of death for only the most aggravated, the most indefensible of crimes. Surely such a desire cannot create a violation of the Constitution.

"We also consider it reasonable to require that a finding that life imprisonment be imposed rather than death should be supported in writing by the trial judge. This we do require under our constitutional power to regulate practice and procedure in the courts. Fla.Const., art. V, § 2(a), F.S.A.

"Cases involving life imprisonment would not be directly reviewable by this Court, and the District Courts of Appeal would not be empowered to overturn the trial judge on the issue of sentence. However, requiring these findings by the judge provides an additional safeguard for the defendant sentenced to death in that it provides a standard for life imprisonment against which to measure the standard for death established in the defendant's case, and again avoids the possibility of discriminatory sentences of death." 283 So.2d 1 at 8

It is in response to this Court's decision in *Furman*, supra, that Florida reenacted its death penalty statutes and has attempted to structure a sentencing procedure confined to reasoned judgment. If we are to believe that *McGautha v. California*, supra, correctly concluded that some discretion is permissible as a part of the state process of determining who is to be executed then Respondent

respectfully submits that the sentencing procedures of Florida now meet the constitutional requirements of due process.

Petitioner's claimed denial of due process, regarding the opportunity for reasoned judgment, does not make the imposition of the death penalty on him invariably cruel and unusual nor does he shoulder and carry the burden required of him herein that under Florida's death sentencing procedures that Petitioner has not received a punishment fitting the crime he committed.

### CONCLUSION

The death penalty does not constitute cruel and unusual punishment per se and this is not altered by the fact that the criminal justice system contains procedures whereby the death penalty may be circumvented by the application of prosecutorial or executive judgment. The statutory procedures provided for by the Florida Legislature to be employed in determining whether a given individual should be sentenced to death is sufficient to remove the deficiencies found to exist by this Court in *Furman v. Georgia*, supra, so that the determination is now one of reasoned judgment rather unbridled discretion.

The facts and circumstances found to exist by the judge and jury when measured against the objective standards and

criteria enumerated in the statute are sufficient to support the judgment and sentence of death. Therefore, the decision of the Supreme Court of Florida upholding the judgment and sentence should be affirmed.

Respectfully submitted,

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A P P E N D I X



STATE OF FLORIDA  
DEPARTMENT OF OFFENDER REHABILITATION

FREQUENCIES ACCORDING TO RACE/SEX BY OFFENSE/SENTENCE  
FOR ALL CAPITAL FELONY OFFENSE LAW OFFENDERS  
AS OF JANUARY 1, 1976

|                           |       | White<br>Male | White<br>Female | Black<br>Male | Black<br>Female | TOTAL |
|---------------------------|-------|---------------|-----------------|---------------|-----------------|-------|
| FIRST<br>DEGREE<br>MURDER | Life  | 83            | 2               | 70            | 1               | 156   |
|                           | Death | 26            | 0               | 29            | 0               | 55    |
| RAPE                      | Life  | 11            | 0               | 14            | 0               | 25    |
|                           | Death | 2             | 0               | 1             | 0               | 3     |
| TOTAL                     |       | 122           | 2               | 114           | 1               | 239   |

Compiled by:  
Research & Statistics Section  
Bureau of Planning, Research & Staff Development  
February 20, 1976

Appendix A

IN THE CIRCUIT COURT, THIRTEENTH JUDICIAL CIRCUIT, IN AND  
FOR HILLSBOROUGH COUNTY, FLORIDA CRIMINAL JUSTICE DIVISION

STATE OF FLORIDA : CASE NO 73-1397  
VS: : DIVISION B  
CHARLES WILLIAM PROFFITT :  
:  
:  
:

ORDER TO DETERMINE MENTAL CONDITION OF DEFENDANT

This cause coming on to be heard before the Court on  
its own motion to determine the Defendant's mental conditions,  
it is thereupon, after due consideration,

ORDERED AND ADJUDGED that the Defendant, CHARLES WILLIAM  
PROFFITT, be examined by Dr. DANIEL J SPREHN,  
and Dr. ROBERT H COPFER, two disinterested qualified  
experts, to determine said Defendant's mental condition at  
this time and at the time of the offense 7/10/73,  
and to testify at a hearing as to HIS, mental condition  
on the 21st day of March A.D., 1974, at 9:00,  
AM.

DONE AND ORDERED on this 15th day of March A.D.,  
1974.

CHARGE: MURDER FIRST DEGREE

WRITTEN REPORT, MR. PLOWMAN, STATE ATTORNEY &

MR. LEVINSON, PUBLIC DEFENDER OFFICE

FILE

James F. Tapia, Jr., Clerk  
Circuit Court

*Walter D. Bennett, Jr.*  
JUDGE OF THE CIRCUIT COURT OF  
HILLSBOROUGH COUNTY, THIRTEENTH  
JUDICIAL CIRCUIT, FLORIDA

Appendix B

ORC 689 156

*Conf file*

DANIEL J. SPREHE, M.D., P.A.  
DIPLOMATE  
AMERICAN BOARD OF PSYCHIATRY AND NEUROLOGY

March 18, 1974

PHONE 838-8399  
2808 BAY TO BAY BOULEVARD  
TAMPA, FLORIDA 33608

SUITE 307  
BAYSIDE BUILDING

Honorable Walter N. Burnside, Jr.  
Judge of the Circuit Court  
Criminal Justice Division  
Hillsborough County Courthouse  
Tampa, Florida 33602

Re: Charles William Proffitt  
Case No. 73-1397  
Division B

Dear Judge Burnside:

Pursuant to your order I performed a psychiatric examination on Charles William Proffitt in the County Jail on March 17, 1974 from 8:05 p.m. to 9:05 p.m. Mr. Proffitt was verbal and cooperative in the interview. The usual type of psychiatric examination, consisting of taking a psychiatric history and performing ongoing mental status examination, was accomplished.

It is my opinion with reasonable medical certainty that Mr. Proffitt is currently able to understand his legal situation, is able to understand the charges against him and is able to assist counsel in the preparation of his defense. He is able to understand the gravity of his situation. In my opinion he is currently mentally competent.

It is also my opinion with reasonable medical certainty that on July 10, 1973 he was not suffering from any psychotic illness and was able to distinguish right from wrong. He had been drinking on that date but by his own account he was not really drunk and he knew that he wanted to kill someone. He also knew that he should try to hide this fact and try to run and evade the law immediately after the crime to which he readily admitted. The alcohol he did ingest was over a period of time from 7:30 p.m. to 4:30 a.m. but he doesn't remember the exact amount. He is aware that he could drive a car competently and he knew that it was a crime to kill and also knew it was a crime to enter someone's house when he entered the apartment where the crime was committed. He admits to a long standing compulsion to kill someone but this compulsion did not involve a break in reality testing and did not involve psychosis in that he always knew that murder was a crime and that he would be answerable for it. He has a long standing sociopathic personality characterized by resort to violence as a solution to his life problems and he has a rather chaotic life history with a lot of anti-social behavior including an Undesirable Discharge from the Armed Forces and numerous minor criminal convictions and other charges where he was not convicted. He had three rather chaotic marriages and has generally lived his life outside the usual standards of society.

Mr. Proffitt states that he believes he is capable of killing again, that his main reason for killing on this occasion was that he "just wanted to see what it would feel like." He makes it clear that he won't let his attorney put on any sort of mitigating witnesses to help in the decision regarding sentencing and that he fully understands the two possibilities open to him with regard to sentencing.

Sincerely,

*Daniel J. Sprehe, M.D.*

Daniel J. Sprehe, M.D.

DJS/vh

cc: State Attorney  
cc: Public Defender

11

Appendix C



*Court File*

ROBERT H. COFFER, JR., M. D. P. A.  
PSYCHIATRY  
205 MEDICAL BUILDING  
1 DAVIS BOULEVARD  
TAMPA, FLORIDA

March 19, 1974

The Honorable Walter N. Burnside, Jr.  
Judge of the Circuit Court  
Hillsborough County Courthouse  
Tampa, Florida

RE: Charles William Proffitt  
Case No. 73-1397

Dear Judge Burnside:

I examined the above-named 28 year old man at the Hillsborough County Jail on March 18, 1974 in accordance with your order. A clinical, diagnostic, psychiatric interview was conducted which lasted 50 minutes.

As a result of this examination it is my opinion that he is competent at this time; that he does understand and comprehend the result of the trial which has already been completed. Further, within bounds of reasonable medical certainty, it is my opinion that he was mentally competent on July 10, 1973, and able to distinguish right from wrong at that time.

Sincerely,

*Robert H. Coffer, Jr.*  
Robert H. Coffe, Jr., M. D.

RHC:be

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1975

No. 75-5706

---

CHARLES WILLIAM PROFFITT,

*Petitioner,*

—v.—

STATE OF FLORIDA,

*Respondent.*

---

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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---

**BRIEF FOR THE N.A.A.C.P. LEGAL DEFENSE AND  
EDUCATIONAL FUND, INC. AS *AMICUS CURIAE***

---

---

JACK GREENBERG

JAMES M. NABRIT, III

DAVID E. KENDALL

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Defense and Educational Fund, Inc.*

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1975

No. 75-5706

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CHARLES WILLIAM PROFFITT,  
*Petitioner,*

—v.—

STATE OF FLORIDA,  
*Respondent.*

---

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

---

**BRIEF FOR THE N.A.A.C.P. LEGAL DEFENSE AND  
EDUCATIONAL FUND, INC. AS *AMICUS CURIAE***

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**Statement of Interest of the N.A.A.C.P. Legal Defense  
and Educational Fund, Inc.**

(1) The N.A.A.C.P. Legal Defense and Educational Fund, Inc., is a non-profit corporation formed to assist black citizens in securing their constitutional rights by the prosecution of lawsuits.

(2) The experience of Legal Defense Fund attorneys in handling capital cases over a period of many years convinced us that the death penalty is customarily applied in a discriminatory manner against racial minorities and the economically underprivileged. Further study and reflection led us to the conclusion that the evil of discrimination was



not merely adventitious, but was rooted in the very nature of capital punishment. Accordingly, in 1967, the Legal Defense Fund undertook to represent all condemned men in the United States, regardless of race, for whom adequate representation could not otherwise be found. Additionally, the Fund provided consultative assistance to attorneys representing a large number of other condemned defendants.

(3) Since this Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), the Legal Defense Fund has continued to provide legal assistance to indigent condemned prisoners of all races. Fund attorneys now represent on appeal more than one hundred death-sentenced defendants. Among these are a number of prisoners condemned under Florida's 1972 death penalty statute; and we have filed certiorari petitions in this Court on behalf of six such prisoners. *Sullivan v. Florida*, No. 74-6377; *Hallman v. Florida*, No. 74-6168; *Gardner v. Florida*, No. 74-6593; *Songer v. Florida*, No. 75-5800; *Alford v. Florida*, No. 74-6717; *Spenkelink v. Florida*, No. 75-5209.

(4) The Court's decision in the instant case may resolve the constitutional issues upon which the lives of these six men and our other Florida clients depend.

(5) Consent has been granted by petitioner and respondent for the filing of this brief *amicus curiae*.

### Question Presented

Whether the imposition and carrying out of the sentence of death for the crime of first degree murder under the law of Florida violates the Eighth or Fourteenth Amendment to the Constitution of the United States?

### Constitutional and Statutory Provisions Involved

This case involves the Eighth Amendment to the Constitution of the United States, which provides:

"Excessive bail should not be required nor excessive fines imposed, nor cruel and unusual punishments inflicted."

It also involves the Due Process Clause of the Fourteenth Amendment.

It further involves the following provisions of the statutes of Florida:

*Fla. Stat. Ann. §775.082 (1975-1976 supp.) Penalties for felonies and misdemeanors*

"(1) A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than twenty-five (25) calendar years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in section 921.141 results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.

(2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, a person convicted of a capital felony shall be punished by life imprisonment as provided in subsection (1).

(3) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced

to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1). . . .<sup>1</sup>

*Fla. Stat. Ann. §782.04 (1975-1976 supp.)<sup>2</sup> Murder*

"(1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the

<sup>1</sup> This statute was amended by Florida Laws 1974, c. 74-383, effective July 1, 1975, to provide:

"(1) A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than twenty-five (25) years before becoming eligible for parole unless the proceeding held to determine sentence according to the procedure set forth in section 921.141 results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.

"(2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1)."

<sup>2</sup> This section was amended in 1974, and the statutory definition of second degree murder was altered slightly. Florida Laws 1974, c. 74-383, §14 (effective July 1, 1975) enacts a new §782.04 which provides:

*"782.04 Murder*

(1)(a) The unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of a person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, rape, sodomy, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person eighteen years or older when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in chapter 775.

death of the person killed or any human being, or when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of seventeen (17) years when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in §775.082.

(b) In all cases under this section, the procedure set forth in §921.141 shall be followed in order to determine sentence of death or life imprisonment.

(2) The unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although with any premeditated design to effect the death of any particular individual, shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in chapter 755.

(3) When a person is killed in the perpetration of, or in the attempt to perpetrate, any arson, rape, sodomy, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb by a person other than the person engaged in the perpetration of or in the attempt to perpetrate such felony, the person perpetrating or attempting to perpetrate such felony shall be guilty of murder in the second degree which constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in chapter 775.

(4) The unlawful killing of a human being when perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate any felony other than any arson, rape, sodomy, robbery, burglary, kidnapping, aircraft piracy or unlawful throwing, placing or discharging of a destructive device or bomb. . . . shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in chapter 775.



(b) In all cases under this section the procedure set forth in section 921.141 shall be followed in order to determine sentence of death or life imprisonment.

(2) When perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, or when committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, kidnapping, aircraft piracy; or the unlawful throwing, placing or discharging of a destructive device or bomb, except as provided in subsection (1), it shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment in the state prison for life or for such term of years as may be determined by the court.

(3) When perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate any felony other than arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, it shall be murder in the third degree and shall constitute a felony of the second degree punishable as provided in section 775.082, section 775.083, or section 775.084."

*Fla. Stat. Ann. §782.07 (1975-1976 supp.) Manslaughter*

"The killing of a human being by the act, procurement or culpable negligence of another, in cases where such killing shall not be justifiable or excusable homicide nor murder, according to the provisions of this chapter, shall be deemed manslaughter and shall constitute a felony of the second degree, punishable as provided in §775.082, §775.083, or §775.084."

*Fla. Stat. Ann. §921.141 (1975-1976 supp.)<sup>3</sup> Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence*

"(1) *Separate proceedings on issue of penalty*—Upon conviction or adjudication of guilt of a defendant of a capital felony the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by section 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems irrelevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7).<sup>4</sup> Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the

<sup>3</sup> Subsection (1) of this statute was amended slightly in 1974 by Fla. Laws 1974, c. 74-379 (effective October 1, 1974) to provide that if through "impossibility or inability" the trial jury is unable to reconvene for a hearing on sentencing, a special jury may be summoned.

<sup>4</sup> The subsections setting forth aggravating circumstances and mitigating circumstances in Fla. Stat. Ann. §921.141 (1975-1976 supp.), however, are numbered respectively, (5) and (6).



defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) *Advisory sentence by the jury*—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist, and

(c) Based on these considerations, whether the defendant should be sentenced to life . . . or death.

(3) *Findings in support of sentence of death*—Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances. In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the

court shall impose sentence of life imprisonment in accordance with section 775.082.

(4) *Review of judgment and sentence*—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after the certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) *Aggravating circumstances*—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use of threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious or cruel.

(6) *Mitigating circumstances.*—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime."

*Fla. Stat. Ann. §922.09 (1973) Capital cases*

"When a person is sentenced to death, the clerk of the court shall prepare a certified copy of the record of conviction and sentence, and the sheriff shall send the

record to the governor. The sentence shall not be executed until the governor issues a warrant, attaches it to the copy of the record, and transmits it to the warden, directing him to execute the sentence at a time designated in the warrant."

*Fla. Stat. Ann. §922.10 (1973) Execution of death sentence*

"A death sentence shall be executed by electrocution. The warden of the state prison shall designate the executioner. The warrant authorizing the execution shall be read to the convicted person immediately before execution."

*Fla. Stat. Ann. §922.11 (1973) Regulation of execution*

"(1) The warden of the state prison or a deputy designated by him shall be present at the execution. The warden shall set the day for execution within the week designated by the governor in the warrant.

(2) Twelve citizens selected by the warden shall witness the execution. A qualified physician shall be present and announce when death has been inflicted. Counsel for the convicted person and ministers of the gospel requested by the convicted person may be present. Representatives of news media may be present under regulations approved by the head of the department of general services. All other persons except prison officers and guards shall be excluded during the execution.

(3) The body of the executed person shall be prepared for burial and, if requested, delivered at the prison gates to relatives of the deceased. If a coffin has not been provided by relatives, the body shall be delivered in a plain coffin. If the body is not claimed by



relatives, the body shall be given to physicians who have requested it for dissection or be disposed of in the same manner as are bodies of prisoners dying in the state prison."

### Statement of the Case

Petitioner has been condemned for first degree murder under a statute enacted by a Special Session of the Florida Legislature on December 8, 1972. Florida Laws 1972, c. 72-724. On July 31, 1973, an "Indictment for a First Degree Murder" was returned in the Hillsborough County Circuit Court charging that petitioner did "unlawfully, and from a premeditated design to effect the death of JOEL RONNIE MEDGEBOW . . . murder the said JOEL RONNIE MEDGEBOW by stabbing him to death with a knife." <sup>5</sup> (R. 204.)<sup>6</sup>

Petitioner worked for the Maas Bros. department store in Tampa (R. 302), and had loaded trucks there until about 7:30 p.m. on July 9, 1973. (R. 303.) He then went to Caesar's Palace, a nearby bar, with two co-workers and remained there until 3:00 a.m. on July 10, 1973. (R. 304.) He was wearing gray trousers and a white Maas Bros. shirt with the company emblem over his breast pocket. (R. 313, 323, 331.) When petitioner left the bar, he took one of the co-workers home, leaving him between 3:30 and 3:45 a.m. (R. 310-311.)

Mrs. Joel Ronnie Medgebow testified that she and her husband went to a dinner party on July 9, 1973, where they

<sup>5</sup> The State proceeded on the theory that petitioner was guilty of either felony—murder or premeditated—deliberated first degree murder (R. 99, 103, 216, 422, 437, 443); the trial court instructed on both theories (R. 473); and the jury returned a general verdict finding petitioner guilty of first degree murder. (R. 491.)

<sup>6</sup> The indictment appears in the record on an unnumbered page between page 20 and 21.

drank some alcohol and smoked some marijuana. (R. 267-268.) They returned to their apartment and went to bed about 10:00 p.m. (R. 249.) At a little before 5:00 a.m. (R. 250), Mrs. Medgebow was awakened by the moaning of her husband. (R. 251.) Suddenly, a man jumped up from her husband's side of the bed, hit her "maybe three times" and ran out of the apartment. (*Ibid.*) Mrs. Medgebow switched on the light and saw that her husband had been stabbed once and was apparently dead. (*Ibid.*) She removed the knife, which he had been grasping, from his chest. She then called the police and ran to get assistance from a neighbor. (R. 251-252.) As she left the apartment, she noticed that a sliding glass door to the pool area of the apartment complex was open. (R. 252.) Mrs. Medgebow was able to give a detailed description<sup>7</sup> of her husband's assailant, but she was unable to identify petitioner as the person who stabbed her husband and struck her. (R. 254.) According to a pathologist, Joel Ronnie Medgebow had been killed by a single stab wound in the heart, seven centimeters deep. (R. 228-229.) There were no other injuries to the body. (R. 229).

A sixteen-year old lodger (R. 386) in petitioner's trailer, Mrs. Helen Bassett, testified that from her bedroom she

<sup>7</sup> According to Mrs. Medgebow, the intruder was a white male of medium height (R. 255), with a "relatively good build" (R. 266), a substantial nose with a "very large" end (*ibid.*), light brown straight hair brushed back on both sides and on top (R. 255, 263-264) (some of his hair fell across his forehead and resembled bangs (R. 263)—the man was not balding (R. 264)), wearing a white pin-striped, long-sleeved shirt (R. 255) (with no company name on the pocket (R. 262)), with the shirt tail out and the sleeves rolled up and light gray or khaki trousers. (R. 255.) The Medgebow apartment did not appear to have been ransacked (R. 276, 290), and although objects of "quite substantial" value (R. 292), jewelry (R. 292-293), and money (R. 293) were in plain sight, and \$142 in cash was in a pair of Medgebow's trousers by the bed (*ibid.*), nothing had been taken from the apartment by the intruder. (R. 290.)



heard petitioner return to the trailer at about "5:30 a.m." on July 10, 1973, and converse with his wife. (R. 375-376.) Although Mrs. Bassett was unable to hear part of this conversation (R. 382-383), she heard petitioner say "[h]e . . . had killed a man . . . [w]ith a butcher knife . . . [while] he was burglarizing the place" (R. 376). She also heard petitioner state that "a lady" was there at the time of the killing and that he had knocked her out. (R. 379.) Petitioner told his wife "to wait a couple of hours before, her to call the police [sic] and to pick up his check the next day." (R. 379-390.) Mrs. Bassett then heard the trailer door close and someone left the trailer and get into the Proffitt family car. (R. 378.) According to Mrs. Bassett, she "went into the kitchen and Mrs. Proffitt came in and she was crying and she said 'Oh my God.' And I said 'Yes, I know. I heard.' And she says 'I have to call the police.' And I says, 'Well do what you think you have to do.' And then . . . she left. She went out." (*Ibid.*)

A Tampa detective talked to Mrs. Proffitt early on July 10 (R. 340); a first degree murder warrant was obtained for petitioner's arrest (R. 341); and the police broadcast a radio bulletin for his automobile at 5:34 a.m. (R. 333). The car was found abandoned on an interstate highway exit ramp at 6:35 a.m. on July 10 (R. 353-354) by a state patrolman.

At petitioner's trial<sup>9</sup> the State introduced a white Mens Bros. shirt found in Petitioner's trailer (R. 334), which had a slight surface smear and a stain the size of a pin-head that were identified as human blood (R. 360-363). This was not a sufficient amount to determine blood type. (R. 361). The police lifted five latent fingerprints from the

<sup>9</sup> During jury selection, a venireman was excluded for cause by the State on account of his conscientious scruples against the death penalty (R. 111-112, 114).

sliding doors in the Medgebow apartment (R. 234), but the "comparable" prints did not match petitioner's (R. 240, 243). Petitioner introduced no evidence at trial.<sup>9</sup>

The jury was instructed that it could find petitioner guilty of first degree murder with a "premeditated design" (R. 473), or first degree felony-murder (R. 475), second degree murder (R. 476), third degree murder (R. 477), manslaughter (*ibid.*), or not guilty. It returned a verdict of first degree murder. (R. 491.)

<sup>9</sup> The theory of petitioner's defense was that Joel Ronnie Medgebow had been killed for reasons relating to illegal marijuana trafficking. At a pre-trial deposition of Mrs. Medgebow, in response to defense counsel's question, "do you know if your husband was a dealer in marijuana?" (R. 607), Mrs. Medgebow said, "I heard him talk to some his friends the night before, and I knew that they were going to pick up marijuana, and from the way they were talking they were going to pick up quite a bit. What he used to do is he never was dealing so to speak to people he didn't know, but we had some friends, maybe two or three couples, that smoked marijuana also and he would get—would buy, say, now, a large amount of marijuana and then he would cut it up and he would sell it to them, and that way he would make back the money that he had paid for it, and he would get a couple of lids free then for himself. He wouldn't have to pay for his own. But it was never except to these few people, to my knowledge." (R. 609). Petitioner's counsel declared in his opening statement that "[y]ou are going to find out that there was a quantity of marijuana within the apartment. You are also going to find out, through testimony of witnesses, that Ronnie Medgebow sold marijuana" (R. 218-219). While cross-examining a police officer concerning "contraband" (R. 296) found in the Medgebow apartment, defense counsel contended that there was "a large amount of marijuana in the apartment and I think that gives a motive for a criminal act" (R. 297). The State Attorney admitted that "[t]he marijuana was found in Joel Medgebow's apartment. There is no denying that," but asserted that there was "absolutely no connection in this case between marijuana and the death of Joel Ronnie Medgebow" (*Ibid.*). At the close of the evidence, the trial court denied the State's mistrial motion based on the reference to marijuana in defense counsel's opening statement, but added that "there is no such testimony in the record to support the statement; the statement was improper, counsel is to be chastised for making such a statement" (R. 424).

A sentencing hearing was subsequently held at which the State introduced one prior Connecticut conviction of petitioner for "breaking and entering without permission." (R. 494.) The State also introduced the testimony of Dr. James Crumbley, a medical doctor who was not a psychiatrist (R. 495-501.) *See* pages 56-57 *infra*. A majority of the jury recommended that petitioner be sentenced to death. (R. 535.) The trial court discharged the jury and appointed two psychiatrists to examine petitioner. (R. 541.) *See* page 56 n.61 *infra*. After their reports were received, the trial court entered findings of fact and sentenced petitioner to be electrocuted.<sup>10</sup>

<sup>10</sup> The court's written sentencing order set forth the following four "aggravating circumstances":

"(A) That the Defendant, CHARLES WILLIAM PROFFITT, murdered JOEL RONNIE MEDGEBOW from a premeditated design and while the Defendant, CHARLES WILLIAM PROFFITT, was engaged in the commission of a felony, to-wit: burglary.

"(B) That the Defendant CHARLES WILLIAM PROFFITT, has the propensity to commit the crime for which he was convicted, to-wit: Murder in the First Degree and is a danger and a menace to society.

"(C) That the murder of JOEL RONNIE MEDGEBOW by the Defendant CHARLES WILLIAM PROFFITT, was especially heinous, atrocious and cruel.

"(D) That the Defendant knowing through his voluntary and intentional acts leading up to and during the course of the commission of the offense for which he was convicted created a great risk of serious bodily harm and death to many persons."

(R. 206-207.) The court further found that the statutory "mitigating circumstances" (*see* pages 32-34 *infra*) were "primarily negated" because:

"(A) The Defendant CHARLES WILLIAM PROFFITT, was convicted in 1967 of Breaking and Entering Without permission.

"(B) That the capital felony for which the Defendant, CHARLES WILLIAM PROFFITT, was convicted was not committed while the Defendant, CHARLES WILLIAM PROFFITT, was under the influences of extreme mental or emotional disturbance.

"(C) That the victim, JOEL RONNIE MEDGEBOW, was not a participant in the Defendant's conduct nor did the victim, JOEL RONNIE MEDGEBOW, consent to the act.

On May 28, 1975, the Florida Supreme Court affirmed this death sentence. *Proffitt v. State*, 315 So.2d 461 (Fla. 1975).

## Summary of Argument

### I.

Florida's 1972 capital punishment statute provides a three-stage procedure for selecting some convicted capital offenders to be killed while others live. Under this procedure, "[c]ertain factual situations may warrant the infliction of capital punishment, but, nevertheless, would not prevent either the trial jury, the trial judge, or [the Florida Supreme] . . . Court from exercising reasoned judgment in reducing the sentence to life imprisonment." *Alword v. State*, 322 So.2d 533, 540 (Fla. 1975). Experience to date in the administration of the statute confirms that this frank

"(D) That the Defendant CHARLES WILLIAM PROFFITT, was the only participant in the capital felony for which he has been convicted.

"(E) That the Defendant, CHARLES WILLIAM PROFFITT, did not act under extreme duress during the commission of the offense nor was he, during that period of time under the substantial domination of another person.

"(F) That at the time of the commission of the offense the Defendant's capacity to appreciate the criminality of his conduct or to conform this conduct to the requirements of law was not substantially impaired.

"(G) The age of the Defendant, CHARLES WILLIAM PROFFITT, to-wit: age 28 years, has no particular significance and therefore is not a mitigating circumstance.

(R. 207, emphasis in original). The court thereupon concluded "that aggravating circumstances do exist, and that these aggravating circumstances *far outweigh* any circumstances which would mitigate the sentence in this case." (*Ibid.*, emphasis added). "The Court finds that the Defendant CHARLES WILLIAM PROFFITT, has been and would continue to be a danger and a menace to society and therefore must pay the ultimate penalty, death by electrocution." (R. 208.)



statement of Florida law means exactly what it says: that in the same case, upon identical facts, a life sentence or a death sentence may be chosen by three discretionary decision-makers. Thus, life sentences and death sentences may be and are imposed with "no meaningful basis for distinguishing" the people who get them. *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (concurring opinion of Mr. Justice White). Detailed examination of the new statute and its use demonstrates that, far from assuring regularity, it merely diffuses responsibility for the life-death sentencing choice.

This explicit capital sentencing decision is itself only one of several mechanisms by which an arbitrary fraction of death-eligible offenders is selected to be actually put to death. Prosecutorial charging and plea-bargaining discretion, jury discretion to convict of one or another amor- phously distinguished "capital" or noncapital crimes, and gubernatorial discretion to grant or withhold clemency are all equally uncontrolled and uncontrollable. In its parts and as a whole, the process is inveterately capricious. To inflict death through such a process is to inflict unconstitu- tional cruel and unusual punishment within the funda- mental historical concerns of the Eighth Amendment<sup>11</sup> that were recognized in *Furman v. Georgia*, *supra*.

## II.<sup>12</sup>

The perpetuation of arbitrariness in post-*Furman* capital punishment schemes is not mere happenstance. The death penalty is too cruelly intolerable for our society to apply

<sup>11</sup> These concerns are documented in the Brief for Petitioner in *Fowler v. North Carolina*, No. 73-7031, at pp. 26-45, and we do not repeat that documentation in the present brief.

<sup>12</sup> This point incorporates by reference the submissions made in petitioners' briefs in *Fowler v. North Carolina*, No. 73-7031, and *Jurek v. Texas*, No. 75-5394.

it regularly and even-handedly; and it is inherently too purposeless and irrational to be applied selectively on any reasoned, non-invidious basis. None of the justifications advanced to support the cruelty of killing a random smat- tering of prisoners annually survives examination in the light of the realities of this insensate lottery; and none begins, of course, to justify the killing of any particular human being while his indistinguishable counterparts are spared in numbers that attest to our collective abhorrence of what we are doing to an outcast few.

## I.

### Introduction.

In 1972, contemporaneously with its decision in *Furman v. Georgia*, 408 U.S. 238, this Court summarily vacated a number of Florida death sentences on the authority of *Furman*.<sup>13</sup> The Supreme Court of Florida,<sup>14</sup> the Court of Appeals for the Fifth Circuit,<sup>15</sup> and the District Court for the Middle District of Florida,<sup>16</sup> thereafter vacated addi- tional death sentences which had been imposed pursuant to

<sup>13</sup> *Anderson v. Florida*, 408 U.S. 938; *Pitts v. Wainwright*, 408 U.S. 941; *Boykin v. Florida*, 408 U.S. 940; *Brown v. Florida*, 408 U.S. 938; *Hawkins v. Wainwright*, 408 U.S. 941; *Johnson v. Florida*, 408 U.S. 939; *Paramore v. Florida*, 408 U.S. 935; *Thomas v. Florida*, 408 U.S. 935; *Williams v. Wainwright*, 408 U.S. 941.

<sup>14</sup> *Anderson v. State*, 267 So.2d 8 (Fla. 1972); *Chaney v. State*, 267 So.2d 65 (Fla. 1972); *Reed v. State*, 267 So.2d 70 (Fla. 1972); *In re Baker*, 267 So.2d 331 (Fla. 1972). See also *Donaldson v. Sack*, 265 So.2d 499 (Fla. 1972).

<sup>15</sup> *Newman v. Wainwright*, 464 F.2d 615 (CA5 1972).

<sup>16</sup> See *Adderly v. Wainwright*, 58 F.R.D. 389 (M.D. Fla. 1972).



Florida's "Recommendation to Mercy" statute.<sup>17</sup> These decisions left no doubt that Florida's pre-1972 death penalty laws were invalid under the Eighth Amendment.

The Florida Legislature responded by enacting c. 72-724 at a Special Session in December, 1972. This legislation authorizes the death penalty for first degree murder, Fla. Stat. Ann. §782.04(1) (1975-1976 supp.), and for sexual battery of a child eleven years of age or under, Fla. Stat. Ann. §794.011(2) (1975-1976 supp.). It was approved by the Governor on December 8, 1972, and took effect immediately.

The relevant portions of the 1972 law are set forth fully at pages 3-12 *supra*. Summarily, it provides a bifurcated trial procedure for the administration of the death penalty. After a defendant is found guilty of a capital felony, a sentencing hearing is conducted before the jury which renders an advisory sentencing verdict. The trial court then pronounces sentence, determining whether there are "sufficient" aggravating circumstances to justify the imposition of a death sentence or "sufficient" mitigating circumstances to justify the imposition of a life sentence. Fla. Stat. Ann. §921.141(1) (1975-1976 supp.), pages 7-8

<sup>17</sup> Fla. Stat. Ann. §919.23 (1969 supp.) provided:

*Recommendation to mercy.*

"(1) In all criminal trials, the jury in addition to a verdict of guilty of any offense, may recommend the accused to the mercy of the court or to executive clemency, and such recommendation shall not qualify the verdict except in capital cases. In all cases the court shall award the sentence and shall fix the punishment or penalty prescribed by law.

"(2) Whoever is convicted of a capital offense and recommended to the mercy of the court by a majority of the jury in their verdict, shall be sentenced to imprisonment for life; or if found by the judge of the court, where there is no jury, to be entitled to a recommendation to mercy, shall be sentenced to imprisonment for life, at the discretion of the court."

*supra*. The statute sets forth some aggravating and mitigating circumstances for the jury and the trial court to consider. Fla. Stat. Ann. §921.141(5), (6) (1975-1976 supp.), pages 9-10 *supra*. If a death sentence is imposed, the case is automatically reviewed by the Florida Supreme Court.

These are the procedures under which petitioner Charles William Proffitt was sentenced to die. *Amicus* respectfully submits that his death sentence is a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. Such a sentence, so imposed, flouts *Furman* (Part II, *infra*) and is inconsistent with "the evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion of Chief Justice Warren) (Part III, *infra*).

## II.

### The Arbitrary Infliction of Death.

#### A. At the Penalty Trial.

##### 1. Florida's 1972 Death Penalty Legislation Is Explicitly Discretionary.

We start with the observation that Florida's post-*Furman* capital sentencing procedure remains avowedly discretionary. In *State v. Dixon*, 283 So.2d 1, 8-9 (Fla. 1973), the Supreme Court of Florida declared:

"[t]he mere presence of discretion in the sentencing procedure cannot render the procedure violative of *Furman v. Georgia*, *supra*; it was, rather, the quality of discretion and the manner in which it was applied that dictated the rule of law which constitutes *Furman v. Georgia*, *supra*. . . .

"Thus, if the judicial discretion possible and necessary under Fla. Stat. §921.141, F.S.A., can be shown to be reasonable and controlled, rather than capricious and discriminatory, the test of *Furman v. Georgia*, *supra*, has been met. . . .

"Death is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation. It is proper, therefore, that the Legislature has chosen to reserve its application to only the most aggravated and unmitigated of most serious crimes. In so doing, the Legislature has also recognized the inability of man to predict the myriad tortuous paths which criminality can choose to follow. If such a prediction could be made, the Legislature could have merely programmed a judicial computer with all of the possible aggravating factors and all of the possible mitigating factors included—with ranges of possible impact of each—and provided for the imposition of death under certain circumstances, and for the imposition of a life sentence under other circumstances. However, such a computer could never be fully programmed for every possible situation, and computer justice is, therefore, an impossibility. The Legislature has, instead, provided a system whereby the possible aggravating and mitigating circumstances are defined, but where the weighing process is left to the carefully scrutinized judgment of jurors and judges."

So, in *Alvord v. State*, 322 So.2d 533, 540 (Fla. 1975), the Court recognized that:

"[t]he law does not require that capital punishment be imposed in every conviction in which a particular state of facts occur [sic]. The statute properly allows some discretion, but requires that this discretion be reason-

able and controlled. No defendant can be sentenced to capital punishment unless the aggravating factors outweigh the mitigating factors. However, this does not mean that in every instance under a set state of facts the defendant must suffer capital punishment."

Again, in *Swan v. State*, 322 So.2d 485 (Fla. 1975), the Florida Supreme Court construed Rule 3.710 of the Florida Rules of Criminal Procedure (1975), which provides that "[i]n all cases in which the court has discretion as to what sentence may be imposed," it may require a presentence report. The Court ruled that "[s]ection 921.141, Florida Statutes, vests the trial court with the limited discretion to impose either the death penalty or life imprisonment . . . Thus, the discretionary nature of Section 921.141 brings it within the ambit of Rule 3.710." 322 So.2d at 489.<sup>18</sup>

<sup>18</sup> It is possible albeit difficult to reconcile the specific holding in *Swan* with that in *Thompson v. State*, Fla. Sup. Ct., No. 45,107, decided January 21, 1976. Both cases construe Fla. R. Crim. Proc. 3.710 (1975), which provides:

"In all cases in which the court has discretion as to what sentence may be imposed, the court may refer the case to the probation and parole commission for investigation and recommendation. No sentence or sentences other than probation shall be imposed on any defendant found guilty of a first felony offense or found guilty of a felony while under the age of 18 years, until after such investigation has first been made and the recommendations of the commission received and considered by the sentencing judge."

We have seen in the text that *Swan* allows a trial judge, in his discretion, to order a presentence investigation report following a first degree murder conviction. This holding is explicitly based upon the ground that such a conviction is a case "in which the court has [sentencing] discretion" within the meaning of the first sentence of Rule 3.710. But in *Thompson*, where the death-sentenced appellant was 17 years old (slip opinion, at p. 1) and "had no prior criminal record" (slip opinion, at p. 5), the Florida Supreme Court held that the second sentence of Rule 3.710 did not require the judge to order a presentence investigation report. The only support offered for this conclusion was a quotation from the *Committee Notes to Rule 3.710*: "no [pre-sentence investigation]



## 2. The Statutory Enumeration of Aggravating and Mitigating Circumstances Does Not Control Arbitrariness in the Exercise of Capital Sentencing Discretion.

The iteration of eight "aggravating" and seven "mitigating" circumstances in Fla. Stat. Ann. §921.141 (1975-1976 supp.) pages 9-10 *supra*, does not significantly confine, channel, or regularize capital sentencing discretion. This is so for several reasons.

### (a) *The breadth of the statutory aggravating circumstances.*

The enumeration of statutory aggravating circumstances does not meaningfully narrow the range of first degree murder cases in which death *may* be imposed as a penalty. For these enumerated circumstances are so broadly written as to make virtually any first degree murder convict a candidate for a death sentence. One of the statutory aggravating circumstances, for example, is that the crime

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report is necessary where the specific sentence is mandatory, e.g., the sentence of death or life imprisonment in a verdict of first degree murder.' (Slip opinion, at p. 5.)

Obviously, the commentator who wrote this passage either (1) thought that a first degree murder conviction was *not* a case "in which the court has [sentencing] discretion" within the first sentence of Rule 3.710, or (2) thought that the only purpose for a presentence investigation report was to enable the sentencing judge to consider the possibility of probation, or (3) thought that this was the only purpose for *requiring* a sentencing judge to order a presentence investigation report in the cases prescribed by the second sentence of the Rule, although a judge could order a report for other purposes under the first sentence of the Rule. Equally obviously, theories (1) and (2) had been rejected by the Florida Supreme Court in *Swan* before *Thompson* came up. So *Thompson* can only rest upon the third theory (unless *Thompson* is the product of an oversight). The trouble with the third theory is that, if this is what the commentator had in mind, he chose an extraordinarily opaque way to state it; and the Florida Supreme Court in *Thompson* neither hinted at this theory nor undertook to distinguish (or even to cite) *Swan*.

is "especially heinous, atrocious, or cruel." Fla. Stat. Ann. §921.141(5)(h), page 10 *supra*. The scope of this provision is illustrated by the Florida Supreme Court's effort to limit it:

"we feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended. It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and, that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily torturous to the victim."

*State v. Dixon, supra*, 283 So.2d at 9.<sup>19</sup>

Other provisions have a similar wide scope. The provision that "[t]he defendant knowingly created a great risk of death to many persons," Fla. Stat. Ann. §921.141(5)(c), page 9 *supra*, was found applicable in petitioner's case although (1) the killer of Joel Medgebow encountered only two people during the perpetration of his crime, and (2) he killed Mr. Medgebow with a single blow of a *knife*, which he did not wield toward or against any other person. All first degree felony-murder cases are automatically "aggra-

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<sup>19</sup> Although the Florida Supreme Court has, in cases subsequent to *Dixon*, found that particular killings were not "especially heinous, atrocious, or cruel" on their facts, it has not narrowed the scope of *Dixon's* formulation; and the later cases therefore serve only to qualify the expansiveness of subsection 921.141(5)(h) with an equal measure of vagueness. See pages 48-50 *infra*.



vated"<sup>20</sup> because Fla. Stat. Ann. §921.141(5)(d), page 9 *supra*, declares it to be an aggravating circumstance that first degree murder is committed in connection with each

<sup>20</sup> The scope of first degree felony-murder liability in Florida is itself both broad and vague. At the time of petitioner's crime, Fla. Stat. Ann. 782.0.(1)(a), page 4 *supra*, provided:

"[t]he unlawful killing of a human being . . . when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb . . . shall be murder in the first degree and shall constitute a capital felony, punishable as provided in §775.082."

Second degree felony-murder was defined by Fla. Stat. Ann. §782.04(2), page 6 *supra*:

"[w]hen committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, except as provided in subsection (1), it [the unlawful killing of a human being] shall be murder in the second degree and shall constitute a felony of the first degree, punishable by imprisonment in the state prison for life or for such term of years as may be determined by the court."

In *State v. Dixon*, 283 So.2d 1, 11 (Fla. 1973), the Florida Supreme Court ruled that these subsections established "two separate and easily distinguishable degrees of crime, depending upon the presence of the defendant as a principal in the first or second degree [citing Fla. Stat. Ann. §776.011 (1972)]. . . . The obvious intention of the Legislature in making this change is to resurrect the distinction between principals in the first or second degree on the one hand and accessories before the fact on the other, in determining whether a party to a violent felony resulting in murder is chargeable with murder in the first degree or murder in the second degree. As to the distinction in any particular case, we need but refer to the rich heritage of case law on the distinctions between principals in the first or second degree and accessories before the fact."

At petitioner's trial, however, the court's instructions did not reflect either the language of the relevant statutes or the *Dixon* exegesis:

"The killing of a human being when committed by a person engaged in the perpetration of or in the attempt to perpetrate any arson, rape, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive de-

of the same felonies (except one) which formed the predicate for first degree felony-murder under Fla. Stat. Ann. §782.04(1)(a), page 4 *supra*. The excepted felony is heroin distribution; and killings in the perpetration of heroin distribution would presumably be "aggravated"

vice or bomb . . . is murder in the first degree even though there is no premeditated design or intent to kill."

(R. 475).

"Murder in the second degree is the killing of a human being by the perpetration of an act imminently dangerous to another and evincing a depraved mind regardless of human life, although without a premeditated design to effect the death of any particular individual and not [sic] done in the perpetration of or in an attempt to perpetrate any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb.

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"If the killing was not from a premeditated design to effect the death of any human being and was not [sic] committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb, but was in the perpetration of an act imminently dangerous to another, evincing a depraved mind regardless of human life, the defendant should be found guilty of murder in the second degree."

(R. 476, 479).

In 1974, the Florida legislature enacted a new definition of second degree felony-murder, effective July 1, 1975:

"[w]hen a person is killed in the perpetration of or in the attempt to perpetrate, any arson, rape, sodomy, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb by a person other than the person engaged in the perpetration of or in the attempt to perpetrate such felony, the person perpetrating or attempting to perpetrate such felony shall be guilty of murder in the second degree, which constitutes a felony of the first degree, punishable by imprisonment for a term of years not exceeding life or as provided in chapter 775."

Fla. Stat. Ann. §782.04(3) (1975-1976 supp.), page 5, n. 2 *supra*. Whether this enactment codifies or overrules *Dixon* is obscure.

under either the "great risk of death to many persons" provision, *supra*, or the "pecuniary gain" provision of Fla. Stat. Ann. §921.141(5)(f), page 10 *supra*. The expansiveness of the latter aggravating circumstances is obvious.<sup>21</sup> And the subsection which designates an "aggravating circumstance" the fact that the "capital felony" of sexual battery of a person under 11 occurred "in the commission of, or an attempt to commit, any . . . rape," §921.141(5)(d), page 9 *supra*, clearly aggravates any sexual assault made potentially capital by Fla. Stat. Ann. §794.011(2) (1975-1976 supp.).<sup>22</sup>

<sup>21</sup> Although the "pecuniary gain" provision might be construed to apply to "contract murder" killings, the Florida Supreme Court has given it a much broader interpretation. In *Hallman v. State*, 305 So.2d 180, 181 (Fla. 1974), for example, the Florida Supreme Court affirmed a death penalty where the trial court had found this aggravating circumstance; the homicide for which appellant Hallman had been condemned occurred, however, during the course of a tavern robbery. Thus, this provision is potentially applicable to *any* slaying in which something of value is taken from the victim or the crime scene. Cf. §921.141(5)(d), p. 9 *supra*.

<sup>22</sup> Florida's sex crimes statutes were revised in 1974. "Sexual battery" is defined in Fla. Stat. Ann. §794.011(1)(f) (1975-1976 supp.) as "oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual battery shall not include acts done for bona fide medical purposes." Florida Statutes Annotated §794.011(2) (1975-1976 supp.) provides that it is a "capital felony" for a person eighteen years of age or older to "commi[t] sexual battery upon, or injur[e] the sexual organs" of a "person" eleven years of age or younger. Section 921.141(5)(d) (1975-1976 supp.) still refers to the crime of "rape" as a predicate felony, although there is no such crime in Florida since Fla. Stat. Ann. §941.01 (1967) was repealed in 1974 and replaced by the crime of "sexual battery" defined in §794.011(1)(f) (1975-1976 supp.), quoted *supra*. Depending on the circumstances, "sexual battery" may be either a capital felony, *supra*, a "life felony" (Fla. Stat. Ann. §794.011(3) (1975-1976 supp.)), a "felony of the first degree" (Fla. Stat. Ann. §794.011(4) (1975-1976 supp.)), or a "felony of the second degree" (Fla. Stat. Ann. §794.011(5) (1975-1976 supp.)).

(b) *The recognition of nonstatutory aggravating circumstances.*

But the amplitude of the statutory aggravating circumstances does not alone account for the broad and unpredictable capital liability established by section 921.141. In addition, trial judges are free to invent—or not invent—aggravating circumstances on the basis of which particular defendants may be condemned. The Florida Supreme Court has declared that "the most important safeguard provided by Fla. Stat. §921.141, F.S.A., is the propounding of aggravating and mitigating circumstances which must be determinative of the sentence imposed." *Alford v. State*, 307 So.2d 433, 444 (Fla. 1975); see also *State v. Dixon*, *supra*, 283 So.2d at 8. However, it has simultaneously rendered this "safeguard" altogether nugatory by holding that a death sentence may be imposed on the basis of aggravating circumstances not specified in section 921.141. In *Sawyer v. State*, 313 So.2d 680 (Fla. 1975), the trial court overruled a jury recommendation of a life sentence for first degree murder and condemned the defendant. The trial judge's opinion listed six "additional facts which the jury did not have during their deliberation on the advisory sentence," 313 So.2d at 681, to justify the imposition of the death sentence.<sup>23</sup> The Florida Supreme Court recast these

<sup>23</sup> The trial judge found, 313 So.2d at 681:

"1. The defendant is charged in the United States District Court for the Southern District of Florida with the crime of bank robbery.

"2. This Court takes judicial notice of its own calendar and notes that there are thirteen (13) additional robbery cases against the same defendant, and that except for four (4) all have been heard before a magistrate and the magistrate has found that the proof was evident and the presumption great that the defendant, ANTHONY E. SAWYER, committed the offenses with which he stands charged. In the remaining four (4) robbery cases the defendant, ANTHONY E. SAWYER, waived his right for a preliminary hearing.



findings in terms of "aggravating circumstances"—although not the "aggravating circumstances" iterated in section 921.141—and affirmed appellant Sawyer's death sentence:

"[w]e find that the aggravating circumstances including (1) the facts of the armed robbery incident;<sup>24</sup> (2) the

"3. During the course of the trial the defendant communicated to various bailiffs that he would take reprisals against persons conducting the trial in the event he would be found guilty.

"4. On October 15, 1973, the date the defendant was to appear before the jury for the rendition of an advisory sentence, he refused to leave his cell in the Dade County Jail, physically assaulted one of the Corrections and Rehabilitation officers and had to be forcibly brought before the Court in handcuffs and leg irons. Counsel for the defendant objected to his being viewed by the jury with handcuffs and leg irons and additional guards were ordered in the courtroom and the handcuffs and leg irons were removed prior to a view by the jury.

"5. The Court finds the defendant is possessed of a violent and ungovernable temper, that he has demonstrated violence in the past and that he has the ability to carry out threats of violence expressed during the courses of the trial.

"6. The defendant according to the testimony adduced during the trial was supporting a drug habit of \$200.00 a day or \$72,000.00 a year. The Court is of the opinion that there is insufficient assistance available to curb this drug habit and the defendant could not be rehabilitated to a point where he would no longer be a danger to the community.

"For the reasons hereinabove stated, this Court, having considered the advisory opinion of the jury as well as the additional circumstances not known to the jury, has made the determination that the defendant be sentenced to death by electrocution."

<sup>24</sup> Fla. Stat. Ann. §921.141(5)(d), p. 9 *supra*, provides that it is an aggravating circumstance if "[t]he capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery. . . ." This provision is not predicated on any particular "facts" of the robbery incident, and the Florida Supreme Court did not specify which "facts" were relevant to its "finding." The trial court, of course, did not rely on this particular statutory aggravating circumstance in its sentencing order.

prior record including the commission of multiple robberies; (3) the fact that the appellant was a hard drug user, requiring the expenditure of \$200.00 per day; and (4) the specific finding of threats of reprisals against persons involved in the trial and prosecution of the appellant and the appellant's violent temper, taken together, are more than adequate to justify the imposition of the death penalty in this cause."

313 So. 2d at 682. The number and nature of factors in aggravation which the jury and the trial judge may consider is thus totally unlimited.

(c) *The vagueness of the statutory aggravating circumstances.*

The statutory aggravating circumstances are as vague and amorphous as they are broad. Obviously, phrases such as "especially heinous, atrocious and cruel" or "great risk of death to many persons" are susceptible to varying interpretation and application by different juries and trial judges. The Florida Supreme Court candidly recognized in *State v. Dixon*, 283 So.2d 1, 6 (Fla. 1973), that, "[t]o a layman, no capital crime might appear to be less than heinous." Its attempt to gloss the section in order to give it some intelligible meaning that might differentiate *among* capital crimes is set out on page 25 *supra*. Subsequent Florida Supreme Court opinions have not improved upon the gloss.<sup>25</sup> "[W]e believe that the Legislature intended something 'especially' heinous, atrocious or cruel when it

<sup>25</sup> "[I]t is difficult to understand how the [*Dixon* court's] . . . definition of heinous as 'extremely wicked' differs from its definition of atrocious as 'outrageously wicked' and, in fact, these judiciously created criteria are just as prone to subjectivity as the words they are meant to define." Forster, *Resurrection of the Death Penalty: The Validity of Arizona's Response to Furman v. Georgia*, 1974 ARIZ. L. J. 257, 285 (footnote omitted).



authorized the death penalty for first degree murder." *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975) (footnote omitted). See, e.g., *Halliwell v. State*, 323 So.2d 557, 561 (Fla. 1975), discussed at pp. 49-50 *infra*:

"the mutilation of the body many hours later [after the killing] was not *primarily* the kind of misconduct contemplated by the Legislature in providing for the consideration of [the "especially heinous, atrocious, or cruel"] aggravating circumstance. If mutilation had occurred prior to death or *instantly thereafter* it would have been *more relevant* in fixing the death penalty." (Emphasis added.)

(d) *The breadth and vagueness of the statutory mitigating circumstances.*

The mitigating circumstances enumerated in section 921.141(6), p. 10 *supra*, are equally viscous. Here, a defendant's life may turn upon the view that his particular judge and jury choose to take of the meaning and the application of the questions whether "[t]he capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance" (a question that apparently means something other than either legal insanity<sup>26</sup> or the *separate* mitigating circumstance that "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired"), or whether "[t]he defendant acted under extreme duress or under the substantial domination of another person," or whether he "was an accomplice in the capital felony committed by another person and his participation was relatively minor." Obviously, these impressionistic judgments cannot be made

<sup>26</sup> See note 60 *infra*.

with any predictability or uniformity.<sup>27</sup> Concerning the provision that "[t]he age of the defendant at the time of the crime" may be a "mitigating circumstance," the Supreme Court of Florida has written:

"the Legislature has chosen to provide for consideration of the age of the defendant—*whether youthful, middle aged, or aged*—in mitigation of the commission of an aggravated capital crime. The meaning of the Legislature is not vague, and we cannot say that such a consideration is unreasonable *per se*. Any inappropriate application by a jury of the standard under the facts of a particular case may be corrected by the Court." *State v. Dixon, supra*, 283 So.2d at 10 (emphasis added).

And concerning the mitigating circumstances that "[t]he defendant has no significant history of prior criminal activity," it should be noted that (1) the Florida Supreme Court apparently<sup>28</sup> approved a finding in petitioner's case that one 1967 breaking-and-entering conviction "primarily negated" this circumstance, *Proffitt v. State*, 315 So.2d 461, 466 (Fla. 1975) (R. 207); and (2) a defendant's "significant history of prior criminal activity" may (but need not) be used alternatively as a nonstatutory aggravating circumstance as in *Sawyer v. State*, 313 So.2d 680, 681 (Fla. 1975), where the Florida Supreme Court treated criminal

<sup>27</sup> See Ehrhardt & Levinson, *Florida's Legislative Response to Furman: An Exercise in Futility?* 64 J. CRIM. L., CRIM. & POL. SCI. 10 17-18 (1973).

<sup>28</sup> We say "apparently" because the indistinct weighing process that is used under Florida law to test the "sufficiency" of mitigating circumstances against the "sufficiency" of aggravating circumstances makes it impossible to determine the significance accorded to any one circumstance in a particular case. See pp. 37-38 *infra*.

charges (not convictions) pending against a defendant as "aggravating," see page 30 and n.23 *supra*.

In *State v. Dixon, supra*, 283 So.2d at 9, the Florida Supreme Court held that aggravating circumstances must be proven by the State beyond a reasonable doubt. The Court has not allocated or defined the burden of proof with regard to mitigating circumstances, however, and advisory sentencing juries and trial courts are left "free to exercise unguided discretion when finding mitigating circumstances."<sup>29</sup>

**(e) The absence of any controls in the process of weighing the "sufficiency" of aggravating and mitigating circumstances.**

The manner in which "aggravating" and "mitigating" circumstances will be weighed and combined in the sentencing process is left to the undirected discretion of jurors and trial judges. Section 921.141(2), page 8 *supra*, makes the ultimate issue whether there are "sufficient" aggravating circumstances to sentence a defendant to death and whether there are "sufficient" mitigating circumstances to sentence him to life imprisonment.

"The majority in *Dixon* stated that 'the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances' . . . . [283 So.2d at 10] But if it is not a counting process, what is it? Without some legislative formulation of the combination of circumstances that justify executing or not executing a defendant, the decision to execute is a function of the sentencer's discretion and

<sup>29</sup> Note, *Florida's Legislative and Judicial Responses to Furman v. Georgia: An Analysis and Criticism*, 2 FLA. ST. L. REV. 108, 141 (1974).

nothing more. There are three reasons why the mere requirement that the sufficiency of the aggravating and mitigating circumstances be weighed does not effectively limit the sentencer's discretion. First, nowhere in the statute is the meaning of the word 'sufficient' developed, yet it is obviously the core of the matter. Secondly, the statute fails to assign, or even indicate, the relative weights of the various enumerated circumstances. Finally, the statute does not ordain what combination of mitigating circumstances will outweigh what combination of aggravating circumstances."<sup>30</sup>

Since the process of appraising "aggravating" and "mitigating" circumstances is entirely undirected, the trial judge may treat a particular aggravating factor as "sufficient" to outweigh three or four designated mitigating factors while another judge chooses to weigh the identical circumstances obversely. The same circumstances—or rationally undifferentiable circumstances—may be taken as a "sufficient" basis for a death sentence in one courtroom, and as insufficient in another room or on another day. And one sentencer may find that "aggravating" circumstance A outweighs "mitigating" circumstance B in the light of other, non-statutory circumstances that a different sentencer would disregard or overlook, or which would cause a different sentencer to alight on the side of life instead of death.

**3. "Trifurcation" Increases Sentencing Arbitrariness.**

We have just seen that the propounding of "aggravating" and "mitigating" circumstances fails entirely to control or constrain the arbitrary license of juries, trial judges, or the Florida Supreme Court to impose—or to decline to impose

<sup>30</sup> Note, *Florida's Legislative and Judicial Responses to Furman v. Georgia: An Analysis and Criticism*, 2 FLA. ST. L. REV. 108, 139-140 (1974) (footnotes omitted).



—the death penalty in any particular case. Indeed, Florida's 1972 statutory capital sentencing procedure is *more* arbitrary and capricious than its pre-*Furman* death sentencing system because (1) sentencing discretion is more broadly disseminated, with no single participant in the process possessing ultimate responsibility for the life-or-death decision and (2) additional uncertainties are injected into the sentencing process by the provision for an "advisory" jury verdict concerning sentence.<sup>31</sup>

"In point of fact, a death sentence could be imposed although the entire twelve member jury had recommended a life sentence. Likewise, the judge could impose a life sentence although the entire jury had recommended death.

"Under the old system, a majority of the twelve member jury, in the exercise of their discretion, determined the nature of the punishment. Under the new law, to the exercise of that discretion is added the opportunity for the arbitrary, completely unfettered, and final exercise of discretion by the judge. Clearly, the new law provides for even more discretion than the quantum thereof condemned in *Furman*."

<sup>31</sup> Cf. the following statement by the Attorney General of Florida at a 1973 legislative hearing before the Select Committee on the Death Penalty of the Florida House of Representatives: "General Shevin . . . 'What I'm concerned about is that you're still giving the jury the option of going back and deciding; and I think again with almost unbridled discretion, whether or not to impose the death penalty. . . . I think [this] is just a little bit chancy [sic] as to whether the court would sustain it or strike it. It's awfully sophisticated and I think just for that reason, I think when it comes before the Court on the attack, that all they're doing here is letting the jury go back and again decide all this on a discretionary basis. I'm just afraid the Court may not see the sophistication and go ahead and strike the statute.'" *Hearings*, Select Committee on the Death Penalty, Florida House of Representatives, at 20-21 (August 9, 1972).

*State v. Dixon*, *supra*, 283 So.2d at 26 (dissenting opinion of Mr. Justice Boyd). Manifestly, Florida's "trifurcated death penalty statute," *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975),<sup>32</sup> has merely compounded the uncertainties of capital sentencing.

(a) *The opacity of the jury's advisory verdict.*

Since the jury does not specify in its verdict the aggravating and mitigating circumstances which it has considered and found, it is impossible for a trial court to relate the verdict to the sentencing scheme contained in the governing statute.<sup>33</sup> The jury's sentencing recommendation is an enigmatic "yes" or "no" on the question whether a capital defendant should be killed, and the trial judge must speculate to divine the underlying basis of the verdict.

<sup>32</sup> "The sentence procedures set out in the act are usually described as 'bifurcated.' In reality, however, the statute creates three tiers in the sentencing process—the jury, the judge, and this Court." *Alvord v. State*, 322 So.2d 533, 542 n. 10 (Fla. 1975) (dissenting opinion of Mr. Justice England).

<sup>33</sup> "The provision for a jury recommendation in the Florida Capital Punishment Act introduces unnecessary discretion into the sentencing procedure because the statute gives no guidance regarding the advisory sentence's relevance. Apparently, the trial judge should give great weight to the advisory sentence, but this is not clear from the statute. If the legislature did not intend the advisory sentence to be important, then the jury's participation in the sentencing hearing would be senseless and expensive extravagance. The further provision that a penalty jury be empaneled, even if there was no jury at the guilt trial, does seem to indicate that the legislature intended the trial judge to pay deference to the jury's recommendation. Regardless of the weight that the legislature intended the trial judge to give to the jury advisory sentence, however, there is another reason why the advisory sentences are problematic: they do not report the jury's underlying reasons for the sentencing decision reached."

Note, *Florida's Legislative and Judicial Responses to Furman v. Georgia: An Analysis and Criticism*, 2 FLA. ST. L. REV. 108, 144 (1974) (footnotes omitted).



There is no meaningful communication between the advisory jury and the sentencing judge as to the facts the jury has found, discounted, treated as "aggravating," treated as "mitigating," rightly or wrongly considered important or dismissed as irrelevant.<sup>34</sup>

(b) *The uncertain importance of the advisory verdict.*

At the trial level at least, sentence is finally imposed by the judge; but it is uncertain what weight he is to give to the jury's advisory sentencing verdict. "In some instances [the advisory verdict] . . . could be a critical factor in determining whether or not the death penalty should be imposed," *LaMadline v. State*, 303 So.2d 17, 20 (Fla. 1974); but presumably, in other undefined circumstances, it is not. In *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975), the Florida Supreme Court declared:

"[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ."

But the *Tedder* "standard" has been as frequently ignored as used.<sup>35</sup> In neither *Sawyer v. State*, 313 So.2d 680 (Fla.

<sup>34</sup> Cf. *Halliwell v. State*, 323 So.2d 557, 561 (Fla. 1975): "We cannot read the minds of jurors, but it is reasonable to suspect that the hideous and gruesome conduct of Appellant in dismembering the body several hours after the murder probably was considered by the jury in recommending the death penalty."

<sup>35</sup> The "standard," if it is such, seems to govern only half of the relationship between trial judge and jury. In *Thompson v. State*, Fla. Sup. Ct. No. 45,107, decided January 21, 1976, the Florida Supreme Court announced that "[i]t stands to reason that the trial court must express more concise and particular reasons, based on evidence which cannot be reasonably interpreted to favor mitigation, to overrule a jury's advisory opinion of life imprisonment and enter a sentence of death than to overrule an advisory opinion recommending death and enter a sentence of life imprison-

1975), nor *Gardner v. State*, 313 So.2d 675 (Fla. 1975), discussed at pages 48-49 *infra*, can it be said that "the facts suggesting a sentence of death . . . [are] so clear and convincing that virtually no reasonable person could differ" with the trial judge's overruling of a jury's recommendation of mercy.<sup>36</sup> And cf. *Swan v. State*, 322 So.2d 485 (Fla. 1975), discussed at pages 49-50 *infra*. Of course, an intractable difficulty in making the kind of assessment implied in *Tedder* is that it is not possible for a trial court to know "the facts" which the jury found, considered, or rejected. See pages 37-38 *supra*.

The relationship between the jury's recommendation and the trial court's sentence is further complicated by the fact

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ment." Slip op. at 7. Why this proposition "stands to reason" if the appellate court's task is to develop a rational set of capital sentencing standards is unclear. Arbitrariness in the operation of the Florida law may consist as much in capricious grants of mercy (which are denied to some defendants but given to others) as in capricious exercises of severity. See BLACK, CAPITAL PUNISHMENT, THE INEVITABILITY OF CAPRICE AND MISTAKE 47 (1974), quoted in Brief for Petitioner, *Fowler v. North Carolina*, No. 73-7031, at pp. 76-77 n.116.

<sup>36</sup> In *Dobbert v. State*, Fla. Sup. Ct. No. 45,558, decided January 14, 1976, the defendant was convicted of the first degree murder of his nine year old daughter, the second degree murder of his seven year old son, and the child abuse of two others of his children. The jury recommended a life sentence on the first degree murder count; the trial judge imposed a death sentence; and a majority of the Florida Supreme Court affirmed. Mr. Justice England declared in dissent that he would have reversed the death sentence on the basis of *Tedder*: "Applying that standard here, I would hold that reasonable persons could disagree with the trial judge and that the jury's recommendation of life imprisonment should be adopted." "As the majority observes, by imposing and discussing the basis for consecutive sentences the trial judge anticipated the possibility that reasonable people could differ with him." *Dobbert v. State*, *supra*, slip. op. at 21 and No. \* *supra*. The majority in *Dobbert* did not cite *Tedder*; and Mr. Justice Overton wrote separately to say that he had applied the *Tedder* standard and found it met, *State v. Dobbert*, *supra*, slip op. at 20.

that a presentence investigation report may be prepared—or may not, as the judge chooses—after the jury's advisory verdict, and may form a part of the factual basis on which the final life-or-death decision is based. See note 18 *supra*. Cf. HUIE, THE EXECUTION OF PRIVATE SLOVAK 172-173 (5th Dell ed. 1974). Thus judge and jury may (or may not) pass the role of fact-finder back and forth as the deadly game of blindman's bluff progresses.

**(c) The uncertain role of the Florida Supreme Court.**

Death sentences imposed under the 1972 Florida statute are automatically reviewed by the Florida Supreme Court. Fla. Stat. Ann. §921.141(4) (1975-1976 supp.), see p. 9 *supra*. As conceived in *State v. Dixon*, *supra*, this appellate review is intended to provide one of several "concrete safeguards beyond those of the trial system to protect [a defendant] . . . from death where a less harsh punishment might be sufficient." *Id.*, 283 So.2d at 7.

"[T]he sole purpose of . . . [this review] is to provide the convicted defendant with one final hearing before death is imposed. Thus, it again presents evidence of legislative intent to extract [sic] the penalty of death for only the most aggravated, the most indefensible of crimes."

*Id.*, 283 So.2d at 8.

No statutory standards of appellate review are provided;<sup>37</sup> and the Supreme Court of Florida has reviewed

<sup>37</sup> Pre-statutory Florida jurisprudence provides no guidance in this regard. Prior to the 1972 statute, the rule in Florida was that appellate courts lacked authority to reduce sentences on grounds of excessiveness. In *Davis v. State*, 123 So.2d 703, 707 (Fla. 1960), for example, the Florida Supreme Court declined to reduce the death sentence of a defendant condemned for rape, ruling that "[i]n a long adhered to line of cases, we have held that where a

the death sentences on both procedural<sup>38</sup> and substantive<sup>39</sup> grounds. In *Songer v. State*, 322 So.2d 481, 484 (Fla. 1975), the court emphasized that "[w]hen the death penalty has been imposed, this Court has a separate responsibility to determine independently whether the imposition of the ultimate penalty is warranted." (Footnote omitted.)

The court has, however, adopted a number of vague, somewhat differing tests to determine whether a sentence of death is "warranted" in particular cases. In *State v. Dixon*, *supra*, 283 So.2d at 7, the court defined its role as assuring that the death penalty would be applied "to only the most aggravated and unmitigated of most serious crimes."<sup>40</sup> In *Halliwell v. State*, 323 So.2d 557, 561 (Fla. 1975), it indicated that on the appeal of a death sentence, it would "[a]s required by statute . . . weigh both the aggravating and the mitigating circumstances as shown in the record." This approach was taken also in *Swan v. State*, 322 So.2d 485, 489 (Fla. 1975), where the court

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sentence is within the statutory limit, the extent of it cannot be reviewed on appeal regardless of the existence or non-existence of mitigating circumstances. . . . [The statute setting the penalty for rape] fixes the maximum penalty for the offense of the appellant at death, and since this is within the statutory limit, it is not reviewable." See also *Brown v. State*, 152 Fla. 853, 13 So.2d 458, 461-62 (1943); *DeLoach v. State*, 232 So.2d 765, 766 (Fla. 1970); *La Barbera v. State*, 63 So.2d 654, 654-655 (Fla. 1953); *La Prell v. State*, 124 So.2d 18, 19 (Fla. App. 1960).

<sup>38</sup> *Taylor v. State*, 294 So.2d 648, 651 (Fla. 1974): "From our reading of the record it appears that the trial judge in his haste to impose sentence may not have properly considered the mitigating circumstances enumerated by the statute and found in the record."

<sup>39</sup> E.g., *Tedder v. State*, 322 So.2d 908 (Fla. 1975). See page 49, *infra*.

<sup>40</sup> In *Thompson v. State*, Fla. Sup. Ct. No. 45,107, decided January 21, 1976, the court repeated "that it was the legislative intent to extract [sic] the penalty of death for only the most aggravated and the most indefensible of crimes." Slip op. at 7.



avowedly engaged in a plenary weighing of sentencing factors: "[h]aving considered the total record, we are of the opinion that there were insufficient aggravating circumstances to justify the imposition of the death penalty." The court had earlier examined the record to discern whether "[t]he State offered . . . [anything] to show the necessity for electrocution." 322 So.2d at 488 (emphasis added). Yet in *Thompson v. State*, Fla. Sup. Ct. No. 45,107, decided January 21, 1976, the court concluded only that it "[found] no objection to the jury's determination," slip op. at 7. The formulation in *Alvord v. State*, 322 So.2d 533, 540 (Fla. 1975), was that "[i]t is our responsibility to review the sentence in the light of the facts presented in the evidence, as well as other decisions, and determine whether or not the punishment was too great."

Other than these pronouncements, no standards of appellate review have emerged from the nineteen cases in which the Florida Supreme Court has reviewed death penalties imposed under the new statute.<sup>41</sup> All that is clear is that the court has affirmed twelve death sentences and reversed seven death sentences.<sup>42</sup> None of its written opinions for

<sup>41</sup> *Darden v. State*, Fla. Sup. Ct. No. 45,108 & 45,056 (February 18, 1976); *Douglas v. State*, Fla. Sup. Ct. No. 44,864 (February 18, 1976); *Thompson v. State*, Fla. Sup. Ct. No. 45,107 (Jan. 21, 1976); *Dobbert v. State*, Fla. Sup. Ct. No. 45,558 (Jan. 14, 1976); *Halliwell v. State*, 323 So.2d 557 (Fla. 1975); *Tedder v. State*, 322 So.2d 908 (Fla. 1975); *Alvord v. State*, 322 So.2d 533 (Fla. 1975); *Songer v. State*, 322 So.2d 481 (Fla. 1975); *Swan v. State*, 322 So.2d 485 (Fla. 1975); *Slater v. State*, 316 So.2d 539 (Fla. 1975); *Proffitt v. State*, 315 So.2d 461 (Fla. 1975); *Sawyer v. State*, 313 So.2d 680 (Fla. 1975); *Gardner v. State*, 313 So.2d 675 (Fla. 1975); *Spinkellink v. State*, 313 So.2d 666 (Fla. 1975); *Alford v. State*, 307 So.2d 433 (Fla. 1975); *Hallman v. State*, 305 So.2d 180 (Fla. 1974); *Sullivan v. State*, 303 So.2d 632 (Fla. 1974); *LaMadline v. State*, 303 So.2d 17 (Fla. 1974); *Taylor v. State*, 294 So.2d 648 (Fla. 1974). See also, *State v. Dixon*, 283 So.2d 1 (Fla. 1973) (pre-trial certification).

<sup>42</sup> See Appendix A, *infra*.

affirmance assays the slightest explanation of why "a less harsh penalty [is not] . . . sufficient," *State v. Dixon, supra*, 283 So.2d at 7; nor has the court offered the meagerest explication of any other reasoned principle of decision.<sup>43</sup> Without the articulation of any standards, without the enunciation of a reasoned opinion on the sentencing question, without analysis of the significance of factual elements thought to justify (or not to justify) the sentence under review, it is far from apparent how the Florida Supreme Court can assure that the death sentence is being inflicted "for only the most aggravated, the most indefensible of crimes." *Id.* at 7.<sup>44</sup>

<sup>43</sup> The Florida Supreme Court's manner of announcing its sentencing review findings has varied considerably. Often, the court simply announces the result without any explication. *E.g. Songer v. State*, 322 So.2d 481 (Fla. 1975); *Sullivan v. State*, 303 So.2d 632 (Fla. 1974). Sometimes the court simply quotes the sentencing findings of the trial judge. *E.g., Proffitt v. State*, 315 So.2d 461 (Fla. 1975); *Gardner v. State*, 313 So.2d 675 (Fla. 1975); *Hallman v. State*, 305 So.2d 180 (Fla. 1974). In a very few cases, the court has undertaken to compare the case under review with other capital cases. *Alford v. State*, 307 So.2d 433 (Fla. 1975); *Alvord v. State*, 322 So.2d 533 (Fla. 1975).

<sup>44</sup> The deficiencies in the 1972 capital punishment procedures, discussed above, nullify, of course, any rational appellate review. In *Taylor v. State*, 294 So.2d 648 (Fla. 1974), for example, the Florida Supreme Court reversed a death penalty imposed by the trial judge against the jury's recommendation of mercy. The court relied on the advisory verdict (the reasons for which were unintelligible, since it consisted of a simple recommendation that the defendant be sentenced to life imprisonment), and it speculated concerning the reasons the jury could have found to justify its verdict. 294 So.2d at 652. It declared that "[a]ll of this [the mitigating circumstances which might possibly have been found] taken together could have substantially impaired the rationality of appellant to the point where the jury, believing his complicity, nevertheless rejected the idea of the imposition of the ultimate penalty. We find no objection to the jury's determination." 294 So.2d at 651-652 (emphasis in original). Florida's capital procedures insured that the Court had to guess at the reasons for the jury's verdict—the jury might have made its decision for the surmised



But even if it could do this, it could *not* assure that life sentences were not being meted out capriciously and in overwhelming numbers for precisely the same "most aggravated, . . . most indefensible . . . crimes." For in Florida, there is no appellate review of a trial judge's imposition of a life sentence in a first degree murder case; such cases are not appealable as of right to the Florida Supreme Court; they may not be appealed at all; and there is still less likelihood that the Florida Supreme Court will ever see the many cases involving lesser-included-offense convictions<sup>45</sup>—frequently resulting from pleas of guilty—all of which make up the record of the way in which Florida's 1972 death penalty is being administered. Consequently, another "infirmity in Florida's appellate review provision is that review by the supreme court cannot protect against arbitrary mitigation of the death penalty at the trial court level . . . . [E]ven if all those executed are found by the supreme court to be guilty of the most 'aggravated' and 'indefensible' crimes, some of those spared at the trial

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reasons, or for no reasons at all. The rationale for its verdict was unknown and unknowable by the Supreme Court which relied upon that verdict.

See pages 46-48, *infra*.

<sup>45</sup> The Florida Supreme Court noted in *State v. Dixon, supra*, 283 So.2d at 8: "[c]ases involving life imprisonment [are] . . . not directly reviewable by [the Florida Supreme] . . . Court, and the District Courts of Appeal [are] . . . not . . . empowered to overturn the trial judge on the issue of sentence." Mr. Justice England has pointed out that "[t]he statute defies uniformity at the outset by limiting our review to only the capital cases where the judge imposes death." *Alvord v. State*, 322 So.2d 533, 542, n.11 (Fla. 1975) (dissenting opinion). "Since we do not have jurisdiction to review capital cases resulting in a sentence of life imprisonment (absent some other basis for our jurisdiction), we have no idea how many persons convicted of capital crimes have avoided a judge's sentence of death. Nor do we know what the juries recommended in those cases." *Id.* at 542 n.2.

court level may also be guilty of that same quality of criminal activity." <sup>46</sup>

#### 4. The Results of "Trifurcation": Caprice and Arbitrariness.

Dissenting from the affirmance of a death sentence in *Alvord v. State*, 322 So.2d 533, 541-542 (Fla. 1975), Mr. Justice England wrote:

"Under the multiple views expressed in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the selective, arbitrary imposition of the death penalty is prohibited by the Eighth and Fourteenth Amendments to the United States Constitution. I believe our death sentence statute fosters rather than avoids the proscribed unbridled discretion. I share the views of our statute which were expressed by Mr. Justice Ervin and Mr. Justice Boyd in *State v. Dixon*, 283 So.2d 1, 11, 23 (Fla. 1973) (dissenting). I can now add to their analyses that Florida's experience under the statute proves their perceptions correct.

"Since the sentencing statute was enacted, we have reviewed several capital felony cases in which the death sentence could have been imposed. These cases range from love triangle deaths to execution-type slayings. In two decided cases a jury recommended life, the judge imposed a death sentence, and we affirmed his sentence. In four decided cases a jury recommended death, the judge concurred, and we affirmed. In one decided case the defendant entered a guilty plea, no jury recommendation was received (for which deficiency we reversed), and the judge imposed a sentence

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<sup>46</sup> Note, *Florida's Legislative and Judicial Responses to Furman v. Georgia: An Analysis and Criticism*, 2 FLA. ST. L. REV. 108, 147 (1974) (footnotes omitted).

of death. In another case a jury recommended and the judge sentenced life imprisonment. In still another, a jury recommended, the judge sentenced and we affirmed a death sentence, while an accomplice was allowed a life sentence on the basis of a plea bargain for his testimony.

"Perhaps it would be possible to analyze each of these cases, together with those life sentences we have never reviewed, and concluded that Florida's trifurcated sentence procedure exhibits a non-discriminatory pattern consistent with the dictates of *Furman*. I cannot, however. I believe our statute will produce *Furman*-prohibited arbitrariness so long as human discretion is injected into one, let alone three, stages of the sentencing process." (Footnotes omitted.)

The life-and-death results in particular cases that have come to judgment under the 1972 Florida death penalty statute completely bear out Mr. Justice England's conclusion. There are now three capital lotteries in Florida:

*First*, a defendant takes his chances before an advisory sentencing jury which, for untold and untellable reasons, makes a recommendation as to whether he will live or die. Statistics do not appear to have been collected concerning the proportion of capital cases in which the jury has recommended mercy and the judge has concurred.

*Second*, the trial judge imposes sentence, independently but (somehow) influenced by the jury's advisory verdict. In *State v. Dixon*, *supra*, 283 So.2d at 8, the Florida Supreme Court emphasized that the trial judge's power to overrule the jury's recommendation would correct for laymen's outrage at capital crime:

"a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts

of the case against the standard [of?] criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience."<sup>47</sup>

But for some defendants at least, the trial judge's sentencing power has proved to be another running of the gauntlet: out of 70 Florida defendants who have been sentenced to death under the new statute<sup>48</sup> at least 20 have been condemned by a trial judge following his rejection of a jury's recommendation of life imprisonment.<sup>49</sup> The Florida Supreme Court has reversed five such death sentences, *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975); *Slater v. State*, 316 So.2d 539, 542 (Fla. 1975); *Thompson v. State*, Fla. Sup. Ct. No. 45,107, decided January 21, 1976, slip opinion at 7; *Swan v. State*, 322 So.2d 485, 489 (Fla. 1975); *Taylor v. State*, 294 So.2d 648, 652 (Fla. 1974);<sup>50</sup> and has affirmed four such death sentences, *Gardner v. State*, 313 So.2d 675 (Fla. 1975); *Sawyer v. State*, 313 So.2d 680 (Fla. 1975); *Dobbert v. State*, Fla. Sup.Ct. No. 45,558, decided January

<sup>47</sup> Thus, although all capital crimes were likely to seem "no . . . less than heinous" to laymen, 283 So.2d at 8, trial judges could be counted on to take a more discriminating view, *ibid*.

<sup>48</sup> See Appendix A, *infra*, for a list of the death sentences which have been imposed under the statute as of February 1, 1976.

<sup>49</sup> Trial judges disregarded jury recommendations of life imprisonment and imposed the death penalty in the *Taylor*, *J. Jones*, *Sawyer*, *Douglas*, *McCaskill*, *Williams*, *Thompson*, *Gardner*, *Swan*, *Burch*, *Slater*, *Dobbert*, *McCray*, *Tedder*, *Provence*, *Buckrem*, *H. Brown*, *Chambers*, *L. Jones*, and *Carnes* cases; the death penalty was imposed without any jury recommendation in the *Holmes*, *LaMadline* and *Agen* cases after the defendants pleaded guilty; see Appendix A, *infra*, for the full citations of these cases.

<sup>50</sup> The death sentence in *Taylor* was reduced by the Florida Supreme Court on an unclear mixture of both substantive and procedural grounds, see note 44 *supra*.



14, 1976; *Douglas v. State*, Fla. Sup. Ct. No. 44,864, decided February 18, 1976; but it has developed no meaningful guidelines for trial court sentencing either where the jury does or does not recommend death. See pages 38-40, *supra*.

*Third*, the Florida Supreme Court reviews death sentences in the manner described at pages 40-45, *supra*. Because this is the stage of greatest visibility and constancy of personnel, it is particularly instructive to observe how it has worked. An examination of the death-sentencing decisions of that court discloses that, even here, different results have been reached in cases which are factually similar, and the Florida Supreme Court has reversed death sentences in cases that involve more aggravated factual circumstances than do some cases in which it has affirmed death sentences.

(1) The court affirmed a death sentence in *Gardner v. State*, 313 So.2d 675 (Fla. 1975), where appellant, in a drunken stupor, brutally beat his wife to death. The evidence revealed that appellant had been drinking heavily for the twenty-four hours before the killing, that he fell asleep with his wife's dead body, that he sought help for her the next morning "because his wife did not appear to be breathing properly," 313 So.2d at 679, that he made no attempt to escape, and that he exhibited remorse upon learning that his wife was dead. See 313 So.2d at 678-679. The jury recommended mercy, but the Florida Supreme Court affirmed the trial court's imposition of a death sentence. In dissent, Mr. Justice Ervin declared, "I do not believe that the statutes contemplate that a crime of this nature is intended to be included in the heinous category warranting the death penalty. A drunken spree in which one of the spouses is killed traditionally has not resulted in the death

penalty in this state."<sup>51</sup> . . . [T]his case involv[es] a crime of passion in a drunken spree." 313 So.2d at 679. The Court apparently discovered the force of Mr. Justice Ervin's point in *Tedder v. State*, 322 So.2d 908 (Fla. 1975), where it reversed the death penalty imposed upon a defendant (the trial court had overruled the advisory jury's verdict of mercy) who had fired several shots at his wife and mother-in-law during a marital dispute and killed the mother-in-law. Notably, this defendant had taken his wife away at gunpoint from her wounded mother: "[a]s they left, his wife saw her mother lying on the floor in a hallway. Appellant would not permit his wife to examine the body." *Tedder v. State*, *supra*, 322 So.2d at 909.<sup>52</sup>

(2) *Gardner* involved a gruesome beating, to be sure. But in *Swan v. State*, 322 So.2d 485 (Fla. 1975), the court vacated a death penalty imposed upon a burglar who, with a confederate, had administered a fatal "severe beating," 322 So.2d at 486, and "torture," 322 So.2d at 487, to a forty-nine year old female housekeeper who was in poor health. And in *Halliwell v. State*, 323 So.2d 577 (Fla. 1975), the court reversed a death sentence imposed upon a defendant who had been convicted of murdering his paramour's

<sup>51</sup> We have found in the Florida decisions for the year 1975 a number of second degree murder and manslaughter convictions in factual circumstances similar to the *Gardner* case. See, e.g., second degree murder convictions (*Lattimore v. Florida*, 323 So.2d 5 (Fla. App. 1975); *Beasley v. State*, 315 So.2d 540 (Fla. App. 1975); *Smith v. State*, 314 So.2d 226 (Fla. App. 1975); *McCrae v. State*, 313 So.2d 429 (Fla. App. 1975); *Noel v. State*, 311 So.2d 182 (Fla. App. 1975); *Melero v. State*, 306 So.2d 603 (Fla. App. 1975)); manslaughter convictions (*Hanna v. State*, 319 So.2d 586 (Fla. App. 1975); *Calvo v. State*, 313 So.2d 39 (Fla. App. 1975); *Robbins v. State*, 312 So.2d 243 (Fla. App. 1975)). *Gardner* appears to be the only case in this year where the slaying of a spouse or lover by the defendant was capitally punished, whatever the aggravation.

<sup>52</sup> Appellant *Tedder's* mother-in-law died from gunshot wounds twenty-eight days later. *Ibid*.



husband. Defendant had beaten the victim to death with an iron bar and had then hacked the body into several pieces. The Florida Supreme Court reversed the death penalty which had been recommended by the jury and imposed by the trial judge, ruling that "a finding of premeditated murder [was justified], but we see nothing more shocking in the actual killing [as distinguished from the subsequent dismemberment] than in a majority of murder cases reviewed by this Court." 323 So.2d at 561.<sup>53</sup>

(3) The facts of *Taylor v. State*, 294 So.2d 648 (Fla. 1974), and *Sawyer v. State*, 313 So.2d 680 (Fla. 1975), unquestionably differ in some regards (as do the facts in any two cases), but the differences hardly seem commensurate with differences between life and death.<sup>54</sup> In both

<sup>53</sup> As in *Taylor v. State*, *supra*, note 44, the court speculated concerning the reasons for the jury's advisory verdict of death: "We cannot read the minds of jurors, but it is reasonable to suspect that the hideous and gruesome conduct of Appellant in dismembering the body several hours after the murder probably was considered by the jury in recommending the death penalty." *Halliwell v. State*, *supra*, 323 So.2d at 561.

<sup>54</sup> *Taylor v. State*, 294 So.2d 648, 649 (Fla. 1975):

"The evidence presented at trial established that the defendant, in the company of two other males, entered a 'package store' owned and operated by Larry Phillips and his 72 year old father, the decedent, Max Phillips. The defendant, with pistol in hand, jumped over the counter after ordering an employee and a customer to lie face-down on the floor. During an ensuing struggle between the defendant and Max Phillips, Larry Phillips drew a pistol from beneath the counter and shot the defendant in the abdomen. . . .

"Larry Phillips testified that he heard a shot strike the bottles on the shelf near him as he attempted to activate a silent alarm in the rear of the store. Other shots were fired, three of which struck and killed Max Phillips. The fatal shot was shown to have entered the body of the decedent on a downward trajectory. The pistol used by Phillips was shown to have not fired the bullets which killed the decedent. The weapon carried by the defendant, Taylor, was never located, nor was the murder weapon found."

cases, black defendants were convicted of slaying white liquor store clerks during the course of an armed robbery. In both cases, more than one armed robber participated in the crime,<sup>55</sup> and there was forcible resistance by the store personnel. In neither case was it established that the defendant intentionally shot the victim.<sup>56</sup> In both cases, the sentencing juries unanimously recommended life imprisonment, and the trial court imposed the death penalty. Yet

*Sawyer v. State*, 313 So.2d 680 (Fla. 1975):

"The facts are as follows: On January 12, 1973, the appellant and two other individuals entered a liquor store in Dade County, Florida, for the purpose of perpetrating a robbery. The appellant, with a revolver in his hand, directed the proprietor's son to turn over all the money. The son turned over the money in the cash register, and then the appellant pushed the son into the back room, questioning him with regard to 'the rest of it.' At this point, the son, his father and appellant were in the back room together. The wife of the proprietor picked up a bottle of whisky and, while standing behind the appellant, struck him over the head with it. Simultaneously, the owner grabbed the appellant around the chest in an attempt to subdue him. During the struggle, the gun which the appellant was holding discharged twice, striking the son and causing his death. The owner released appellant, . . . and the appellant fled the store."

<sup>55</sup> Sawyer's two co-defendants, Dixon and Lester, were subsequently acquitted of complicity in this felony-murder. *State v. Dixon*, Dade County Cir. Ct. No. 73-1001-A (verdict-January 11, 1974); *State v. Lester*, Dade County Cir. Ct. No. 73-1001-B (verdict-November 6, 1975).

<sup>56</sup> In *Taylor*, the evidence clearly suggested that the defendant did not fire the fatal shot. *Taylor v. State*, *supra*, 294 So.2d at 652. In *Sawyer*, the fatal shot was fired from appellant's gun during a struggle with someone who was not the victim of the shooting. *Sawyer v. State*, *supra*, 313 So.2d at 680. See note 54 *supra*. Under the established doctrine of felony-murder, of course, no finding of intent or premeditation is necessary to justify a conviction for first degree murder, see, e.g., *Jefferson v. State*, 128 So.2d 132, 136 (Fla. 1961), and one felon may be held vicariously liable for an unintentional killing by a co-felon, a police officer, or a person resisting the felony during the course of the felony. See, e.g., *Hornbeck v. State*, 77 So.2d 876, 878-879 (Fla. 1955); *Griffith v. State*, 171 So.2d 597, 597-598 (Fla. App. 1965).

in one case, the Florida Supreme Court reversed the death penalty, and in the other, it affirmed the trial court's sentence on the basis of "aggravating circumstances" not specified in the Florida capital punishment statute, *see* pages 29-31, *supra*. These latter circumstances show that Anthony Sawyer—like Titus Oates—was a very bad man (although he had not been convicted of the various non-capital offenses with which he was charged); but the Florida Supreme Court had earlier said that the death penalty was to be reserved for the "most aggravated [and] . . . indefensible of crimes,"<sup>67</sup> not the most aggravated and indefensible of people.

(4) Again, the court vacated a death penalty in *Halliwel v. State*, pages 49-50 *supra*, imposed for a gruesome slaying found by the trial court to be "especially heinous, atrocious or cruel" and found by the advisory jury to be deserving of death. The court affirmed a death penalty in *Spinkellink v. State*, 313 So.2d 666 (Fla. 1975), on the basis of a similar finding by the trial court and recommendation by the jury in a less aggravated case where there had been considerable provocation for the killing. In *Spinkellink*, the defendant had picked up the deceased, who was hitchhiking; "both men had criminal records, and both were heavy drinkers." 313 So.2d at 668. "During their travels Appellant [Spinkellink] learned first hand of Szymankiewicz's [the deceased's] vicious propensities when the latter forced him to have homosexual relations with him, when the latter played 'Russian Roulette' with him and boasted of killing a fellow inmate while in prison. After checking into a motel in Tallahassee, Appellant [Spinkellink] discovered that his traveling companion had relieved him of his cash reserves." *Ibid*. Spinkellink returned to recover

<sup>67</sup> *State v. Dixon*, 283 So.2d 1, 8 (Fla. 1973), quoted at page 25 *supra*.

his money, and Szymankiewicz was later found dead in the motel room, shot twice with his own pistol, perhaps while sleeping. Spinkellink was subsequently convicted of Szymankiewicz' murder. *Ibid*. The Florida Supreme Court noted that "while admitting that he had fired the gun that killed Szymankiewicz, Appellant [Spinkellink] sought to show mitigating circumstances by showing, first, that he was carrying the gun [of Szymankiewicz] because he was afraid for his own life, and secondly, that the gun discharged during a fight between the two." *Ibid*. Although the Court stated that "[a]dmittedly, the evidence clearly shows that the deceased was an individual of vicious temperament and that Appellant [Spinkellink] was justified in concluding that he would do well to sever their relationship," 313 So.2d at 670, it rejected Spinkellink's claim that the factual circumstances of his relationship with the deceased and his putative self-defense claim established any mitigating circumstances.<sup>68</sup>

<sup>68</sup> Mr. Justice Ervin wrote in dissent, 313 So.2d at 673:

"[i]n this case it appears that Appellant at the time of the homicide was a 24-year-old drifter who picked up Szymankiewicz [the deceased], a hitchhiker. Both had criminal records and both were heavy drinkers. Szymankiewicz, the victim in this case, was a man of vicious propensities who boasted of killings and forced Appellant to have homosexual relations with him. Appellant discovered that Szymankiewicz had 'relieved him of his cash reserves.'

"It was under these conditions that Appellant returned to the motel room where the homicide occurred. Appellant testified he shot Szymankiewicz in self-defense. Evidence to the contrary was only circumstantial. In fact, only through such evidence was it possible to infer the crime was premeditated and different from Appellant's direct testimony that he shot Szymankiewicz in self-defense. The reasoning of this Court on the suddenness in which premeditation may be found is suspect and allowed the prosecution undue latitude to readily shift from the theory of felony murder to premeditated murder.

"It does not appear to me that in this situation there was sufficient certainty of premeditated guilt and heinousness to warrant the death penalty. When the nature of the relation



### 5. The Death Sentence Imposed Upon Petitioner Was Characteristically Arbitrary.

The vagaries of Florida's 1972 death penalty statute are manifest in petitioner's case. On the basis of the trial testimony, of an otherwise undescribed 1967 Connecticut conviction for "the crime of breaking and entering without permission," R. 494,<sup>59</sup> and of the testimony of Dr. James Crumbley, a medical doctor who was not a psychiatrist,<sup>60</sup>

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between Appellant and Syzmankiewicz is taken into account, along with the viciousness of the victim's character and his theft of Appellant's money, it is obvious that hostility existed between them that could have produced a mortal encounter that involved self-defense shooting."

<sup>59</sup> Apparently the relevance of this conviction was to "primarily negat[e]" the "mitigating circumstance" set forth in Fla. Stat. Ann. §921.141(6)(a): that "[t]he defendant has no significant history of prior criminal activity." See pp. 32-34 *supra*. Under Fla. Stat. Ann. §921.141(5)(b) it is an "aggravating circumstance" that [t]he defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person." But the state did not claim that the Connecticut conviction qualified as such an "aggravating circumstance," and it did not elucidate the underlying facts of this 1967 crime.

<sup>60</sup> Dr. Crumbley served as "a consultant to the Sheriff's Department for diagnostic problems" (R. 496-497) and had interviewed petitioner twice for "[a]pproximately fifteen or twenty minutes" (R. 501). Dr. Crumbley testified that petitioner revealed to him that he "had this uncontrollable desire which built up to a terrific degree of unbearable tension for [sic] which he fought as hard as he could and, finally, one evening after work on the way home the uncontrollable desire came again that was of such intensity that he knew that he must kill someone." (R. 498.)

"Q. [Assistant State Attorney] Is it your opinion that based on his statements to you that this man is a dangerous man could be a danger in the future to society?

A. [Dr. Crumbley] Absolutely.

Q. He could also be a danger to other inmates of any facility for incarceration?

A. Yes, he could."

(R. 500.) On cross-examination, however, Dr. Crumbley's testimony took a new turn in response to questions which sought to

the jury rendered an advisory sentencing verdict which stated simply, "[a] majority of the jury advise and recommend to the Court that it impose the death penalty upon the defendant, Charles William Proffitt." (R. 491.)

The trial court then ordered petitioner examined by two psychiatrists (R. 536) and subsequently sentenced him to death on the basis of four "aggravating circumstances" (R. 57-58) and a finding that the statutory "mitigating circumstances" were "primarily negated" (R. 58.) The court concluded that it found "that aggravating circumstances do exist, and that these aggravating circumstances *far outweigh* any circumstances which would mitigate the sentence in this case." *Ibid.* (emphasis added). "The Court finds that the Defendant, CHARLES WILLIAM PROFFITT, has been and would continue to be a danger and a menace to society and therefore must pay the ultimate penalty, death by electrocution." (R. 59.)

One of the "aggravating circumstances" found by the trial court was that the murder of Joel Ronnie Medgebow

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establish the existence of three mitigating circumstances: that "[t]he capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance" (Fla. Stat. Ann. §921.141(6)(b)); that "[t]he defendant acted under extreme duress or under the substantial domination of another person" (Fla. Stat. Ann. §921.141(6)(e)); and that "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired" (Fla. Stat. Ann. §921.141(6)(f)). Dr. Crumbley testified that at the time of the interview, petitioner was seeking "psychiatric treatment" (R. 503), that when petitioner committed the crime, "I am certain that this individual was under an intense amount of uncontrollable emotional stress," and "couldn't help" doing what he did (*ibid.*), and that petitioner's condition could be treated so that he was no longer "a danger to society or to fellow inmates" (R. 504.) Dr. Crumbley concluded, "I'm certain that at the moment and at the time that this occurred this individual was overwhelmed with the force over which he had no control and to which he must carry out the deed . . . [s]o that he was unable to conform his conduct to the requirements of law." (*Ibid.*)



was "especially heinous, atrocious or cruel." (R. 57.) While, in a very real sense, "all killings are atrocious," *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975), the slaying here (involving one stab wound to the heart) cannot plausibly be said to entail "something 'especially' heinous, atrocious or cruel." *Tedder v. State, supra*, 322 So.2d at 910 (footnote omitted). It clearly did not involve acts which were "designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others," which "set the crime apart from the norm of capital felonies—[a] . . . conscienceless or pitiless crime . . . unnecessarily torturous to the victim," *State v. Dixon, supra*, 283 So.2d at 9. *Cf. Swan v. State*, 322 So.2d 485 (Fla. 1975), discussed at page 59 *infra*; *Halliwell v. State*, 323 So.2d 557 (Fla. 1975), discussed at pages 49-50 *supra*.

The trial court also found as an "aggravating circumstance" that petitioner had a "propensity" to commit a crime for which he was convicted and that he constituted a "danger and a menace to society." (R. 57.) This particular "aggravating circumstance" appears nowhere in the Florida statute, of course; it is one of the open-ended roster of *ad hoc* justifications for imposing a death sentence that Florida trial judges are free to invent. *See* pages 29-31 *supra*. Moreover, the determination that petitioner had a "propensity" to commit murder and that he was a "menace to society" is not supportable on the record.<sup>61</sup> It is merely

<sup>61</sup> While Dr. Crambley stated that petitioner "could be a danger in the future to society" (R. 500), this doctor—who was not a psychiatrist—also indicated that petitioner's condition was susceptible to treatment which would make him no longer "a danger to society." *See* note 60 *supra*.

At a second sentencing hearing after the advisory jury had been discharged, Dr. Robert H. Coffey, a psychiatrist who had been appointed by the trial court to examine petitioner, testified that he had given petitioner a "regular diagnostic interview" (R. 543) which had lasted approximately fifty minutes (R. 544). Dr. Coffey concluded that petitioner "knew the difference between right and

a visceral reaction verbalized as a justification for sentencing petitioner to death.

The finding as an "aggravating circumstance" that petitioner knowingly created a great risk of serious bodily harm and death to many persons" (R. 206-207) is a hybrid. The statute contains the aggravating circumstance of knowingly creating a great risk of "death" to many persons (Fla. Stat. Ann. §921.141(5)(c), page 9 *supra*); and the trial judge used his plenary power to add "serious bodily harm." In any event, the finding is baseless either as a statutory or nonstatutory aggravating circumstance. The relevant subsection of the statute is directed at wanton and serious endangering of the general public, as by exploding a bomb in a public place, shooting into a crowd, or hijacking an airplane. Indeed, in a hearing before the Select Com-

wrong" on the day of the crime (R. 545) and had "the capacity . . . to appreciate the criminality of his conduct . . . [and] to conform his conduct to the requirements of law." (*ibid.*) He did not address the question whether petitioner was a "danger" or a "menace" to society. On cross-examination, he stated that petitioner was affected by "a personality disorder, a tendency to act out his feelings" (R. 547) and that petitioner would not "improve much with treatment" (R. 549). Dr. Coffey observed that petitioner did not indicate any desire "to repeat the kind of act which occurred on the 10th" or "an urge to continue killing people" (R. 550).

The second psychiatrist appointed by the trial court, Dr. Daniel J. Sprehe, did not testify but his report indicated that petitioner had admitted during his interview with Dr. Sprehe that he had "a long standing compulsion to kill someone." (R. 44.) Dr. Sprehe concluded that petitioner had a long standing sociopathic personality characterized by resort to violence as a solution to his life problems" (*ibid.*), but he did not address his question whether petitioner's personality disorder could be successfully treated.

There is, of course, extraordinary disagreement among medical experts and social scientists concerning the extent to which it is possible to make reliable predictions of future anti-social behavior by a particular individual. *See* Brief for Petitioner, *Jurek v. Texas*, No. 75-5394 at Part II. Perhaps that is why no one in this case, except the trial judge, ventured to predict that petitioner would repeat the crime of murder.

mittee on the Death Penalty of the Florida House of Representatives, Committee Chairman Jeff D. Gautier summarized this provision: "[t]he defendant knowingly created risk of death to many persons. That's your hijacking sections [sic]."<sup>62</sup> But even conceding the trial court's power to ignore the statute (see pages 29-31 *supra*), it surely beggars reason and deprives language of intelligible meaning to find that petitioner created a great risk of death or serious bodily harm to many people. Joel Medgebow's killer came into contact with *one* other person besides the victim during the course of the crime, and he used a *knife* only against Mr. Medgebow.

There was adequate evidence to sustain the finding of the fourth "aggravating circumstance" listed by the trial judge: that Mr. Medgebow's murder was committed during the felony of burglary. (R. 57.) But this one supportable finding hardly lends integrity to the final result, which the statute requires to be reached by assessing the sufficiency of all aggravating circumstances to justify a death sentence. Three of the four aggravating circumstances cited by the trial judge here are, to use the apt words of Professor Charles Black, either "caprice" or "mistake" or both.<sup>63</sup> Moreover, there is nothing in the record to explain why this particular felony murder is any more aggravated than the many in which life sentences have been imposed<sup>64</sup>

<sup>62</sup> *Hearings*, Select Committee on the Death Penalty, Florida House of Representatives, at 66 (Aug. 4, 1972).

<sup>63</sup> Black, *op. cit. supra* note 35, at 18-20.

<sup>64</sup> See, e.g., *Hernandez v. State*, 323 So.2d 318 (Fla. App. 1975); *Wilson v. State*, 306 So.2d 513 (Fla. 1975); *Miller v. State*, 300 So.2d 53 (Fla. App. 1974); *Jefferson v. State*, 298 So.2d 465 (Fla. App. 1974); *Williams v. State*, 297 So.2d 67 (Fla. App. 1974); *Dinkens v. State*, 291 So.2d 122 (Fla. App. 1974); capital defendants have also been convicted of second degree murder in felony murder situations, see, e.g., *Ballard v. State*, 323 So.2d 297 (Fla. App. 1975); *Gilbert v. State*, 311 So.2d 385 (Fla. App. 1975).

or in which the Florida Supreme Court has vacated death sentences. See, e.g., *Swan v. State*, 322 So.2d 485 (Fla. 1975); *Slater v. State*, 316 So.2d 539 (Fla. 1975); *Thompson v. State*, Fla. Sup. Ct. No. 45,107 (Jan. 21, 1976). In *Swan*, for example, the defendant and a companion burglarized a home at night and gave the housekeeper such a "severe beating," 322 So.2d at 486, that she died from "the torture . . . administered," 322 So.2d at 487. The Florida Supreme Court nevertheless held that considering "the total record, we are of the opinion that there were insufficient aggravating circumstances to justify the imposition of the death penalty." 322 So.2d at 489.

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Despite the mandate of *Furman v. Georgia*, petitioner remains simply one of "a capriciously selected random handful upon whom the sentence of death has in fact been imposed,"<sup>65</sup> while the same sentence of death has been averted from others under Florida's 1972 statutory procedures with "no meaningful basis for distinguishing" the spared from the condemned.<sup>66</sup> This case does not therefore necessitate resolution of the question whether, in the words of Chief Justice Burger's *Furman* dissent, "there is [any] . . . reason to believe that sentencing standards in any form will substantially alter the discretionary character of the [pre-*Furman*] . . . system of sentencing in capital cases."<sup>67</sup> See also *McGautha v. California*, 402 U.S. 183, 208 (1971); ROYAL COMMISSION ON CAPITAL PUNISHMENT 1949-1953, REPORT 174 (H.M.S.O. 1953) [Cmd. 8932]. For the Florida Supreme Court itself has described Florida's "standards" and procedures in a way that makes their incompatibility with *Furman* palpable:

<sup>65</sup> *Furman v. Georgia*, *supra*, 408 U.S. at 309-310 (concurring opinion of Mr. Justice Stewart).

<sup>66</sup> *Id.* at 313 (concurring opinion of Mr. Justice White).

<sup>67</sup> *Id.* at 401.



"[c]ertain factual situations may warrant the infliction of capital punishment, but, nevertheless, would not prevent either the trial jury, the trial judge, or this Court from exercising reasoned judgment in reducing the sentence to life imprisonment. Such an exercise of mercy on behalf of the defendant in one case does not prevent the imposition of death by capital punishment in the other case."

*Alvord v. State*, 322 So.2d 533, 540 (Fla. 1975).

### B. Before and After the Penalty Trial.

But what we have said so far is only a part of the story, because the sentencing discretion explicitly authorized by this 1972 statute is but one of several points at which arbitrariness riddles the procedures determining who lives and dies for "capital" crime in Florida. The capricious administration of death that results from unfettered prosecutorial charging and plea bargaining powers, from jury sympathy or revulsion as they affect the jurors' determinations of degrees and grades of offenses, and from the executive's prerogative of clemency has been described at length in the Brief for Petitioner, *Fowler v. North Carolina* No. 73-7031, at 41-101 [hereafter cited as Petitioner's *Fowler* Brief]. We will not burden the Court with a recapitulation of that documentation here. Suffice it to sum up with the Government's apt conclusion regarding the way in which systems of "capital" justice generally function in this country today: "[t]hose [capital defendants] whose execution is not averted by one of the avenues of discretionary mercy or constitutional safeguard have been sent to their death because none of a large number of actors thought they deserved to be spared." Brief for the United States as *Amicus Curiae*, *Fowler v. North Carolina*, No. 73-7031, at 75-76.

In the following subsections, we do no more than to describe the particular Florida-law doctrines, practices and procedures which pave the local stretches of the "avenues of mercy" to which the Government refers. We respectfully hope that the Court will consent to consider these subsections in connection with the fuller discussions found in Petitioner's *Fowler* Brief of (1) prosecutorial charging discretion (*id.* at 45-53); (2) plea bargaining (*id.* at 53-61); (3) jury discretion (*id.* at 62-95); and (4) executive clemency (*id.* at 95-100). Parallel local-law sections will be found in the Briefs for Petitioners in *Roberts v. Louisiana*, No. 75-5844, and *Jurek v. Texas*, No. 75-5394, and in the Brief for the N.A.A.C.P. Legal Defense and Educational Fund, Inc., as *amicus curiae* in *Gregg v. Georgia*, No. 74-6257.

### 1. Prosecutorial Charging Discretion.

In Florida, each State Attorney must "appear in the circuit court . . . within his judicial circuit, and prosecute or defend on behalf of the state all suits, applications, or motions, civil or criminal, in which the state is a party." Fla. Stat. Ann. §27.02.<sup>68</sup> He possesses broad and unreviewable authority to make charging decisions and to initiate and terminate prosecutions.<sup>69</sup> The State Attorney:

<sup>68</sup> Cf. Fla. R. Crim. Proc. 3.115 (1975): "The state attorney shall provide the personnel or procedure for criminal intake in the judicial system." No further guidelines are established.

<sup>69</sup> The statutes defining the powers of the State Attorney are to be "liberally construed." *Barnes v. State*, 58 So.2d 157, 159 (Fla. 1952).

"[T]he constitution and statutes impose a duty upon the state attorney to prosecute in the circuit court any and all violations of the criminal laws of which that court has jurisdiction either upon his own information or upon indictment by the grand jury. If any indictment has not been found or any information filed for such offense, then all indictable offenses



"[h]as been loosely referred to many times as a 'one-man grand jury'. And he is truly that. He is the investigatory and accusatory arm of our judicial system of government, subject only to the limitations imposed by the Constitution, the common law, and the statutes, for the protection of individual rights and to safeguard against the possible abuses of the far reaching powers so confided."

*Imperator v. Spicola*, 238 So.2d 503, 506 (Fla. App. 1970).

"[W]ithin the limits of the constitution and applicable statutes all steps in the prosecution of persons suspected of crime are under . . . [the state attorney's] supervision and control."

*Collier v. Baker*, 155 Fla. 425, 20 So.2d 652, 653 (1945).<sup>70</sup> Although the Florida legislature could, pursuant to its authority to prescribe the "powers and duties" of the state attorney, *Owens v. State*, 61 So.2d 412, 414 (Fla. 1952); see also *Johns v. State*, 144 Fla. 256, 197 So. 791 (1940), enact guidelines to specify when a capital indictment should be sought, it has not done so. Consequently, the prosecutor's power to seek or to forego capital indictments remains broadly discretionary:

"[w]here . . . [a state attorney's] duty and authority require the examination of evidence in the determina-

triable within the county should be presented to the grand jury by the state attorney."

*State v. Mitchell*, 188 So.2d 684, 687 (Fla. App.), cert. discharged, 192 So.2d 281 (Fla. 1966). See also *Smith v. State*, 95 So.2d 525, 527 (Fla. 1957). Cf. *Newton v. State*, 178 So.2d 341, 344 (Fla. 1965).

<sup>70</sup> All capital prosecutions in Florida must be initiated by indictment. Fla. Const., art. 1, §15, Fla. Stat. Ann. (1970); Fla. R. Crim. Proce. 3.140(a)(1) (1975). Any grand jury, of course, has absolute discretion to indict or not to indict regardless of the evidence presented to it.

tion of law and fact before taking action thereon, his duty and authority is ordinarily not strictly ministerial, but may even be quasi-judicial or discretionary in its character."<sup>71</sup>

*Hall v. State*, 136 Fla. 644, 187 So. 392, 398 (1939).

The state attorney can terminate a criminal action whenever he determines "that the prosecution is not justified." *Barnes v. State*, 58 So.2d 157, 159 (Fla. 1951). See generally *Wilson v. Renfree*, 91 So.2d 857, 859-860 (Fla. 1956). "[T]he State has a right to take a nolle prosequi at any time prior to the jury being sworn," *State v. Sokol*, 208 So.2d 156 (Fla. App. 1968), without consent of the trial court.<sup>72</sup> When a state attorney retracts an indictment or information without the formal entry of a nolle prosequi, the charge may be refiled without securing judicial approval.<sup>73</sup> *State v. Wells*, 277 So.2d 543, 544 (Fla. App. 1973); *State v. Fattorusso*, 228 So.2d 630, 633 (Fla. App. 1969); *Wilk v. State*, 217 So.2d 610, 612 (Fla. App. 1969). Under the state attorney's authority to "contract with a criminal for his exemption from prosecution," *Ingram v. Prescott*, 111 Fla. 320, 149 So. 369 (1933), he may file capital charges against one co-defendant but not against another equally culpable co-defendant. And the state at-

<sup>71</sup> Cf. *Carlile v. State*, 129 Fla. 860, 176 So. 862, 863 (1937): "The state attorney has a very broad discretion in examining witnesses . . . prior to indictment."

<sup>72</sup> If such consent is not obtained and if the nolle prosequi is not made part of a formal judgment, the state attorney is not prevented from prosecuting a party in violation of the nolle prosequi agreement, however. *Ingram v. Prescott*, 111 Fla. 320, 149 So. 369, 370 (1933) (dictum).

<sup>73</sup> Florida Rule of Criminal Procedure 3.191 (1975), setting forth certain provisions to assure criminal defendants a speedy trial, may limit the period in which an action can be refiled by the state attorney.

torney can seek a conviction for any lesser degree of a capital offense, Fla. R. Crim. Proc. 3.140(k)(6) (1975), or for "any lesser offense, which, although not an essential ingredient of the major crime, is spelled out in the accusatory pleading in that it alleges all of the elements of the lesser offense," *State v. Anderson*, 270 So.2d 353, 356 (Fla. 1972).

## 2. Plea Bargaining.

Furthermore, the state attorney's discretion to plea bargain is utterly unfettered by the 1972 capital punishment statute or by any other significant restrictions. Florida Rule of Criminal Procedure 3.170(g) (1975) explicitly authorizes plea bargaining:

"[t]he defendant, with the consent of the court and of the prosecuting attorney, may plead guilty to any lesser offense than that charged which is included in the offense charged in the indictment or information or to any lesser degree of the offense charged."

Rule 3.171(a) (1975) provides that "[t]he Prosecuting Attorney is encouraged to discuss and agree on pleas which may be entered by a defendant." Where plea bargaining precedes the filing of the charging paper, even the discretionary power of the trial court to supervise negotiated dispositions can be avoided. For in Florida, defendants have a legal right to plead guilty to a criminal charge, *Canada v. State*, 144 Fla. 633, 198 So. 220, 223 (1940); *Eckles v. State*, 132 Fla. 526, 180 So. 764, 766 (1938); and a trial court's power to reject a guilty plea is limited to those cases where the plea is "not 'entirely voluntary by one competent to know the consequence,' or is 'induced by fear, misapprehension, persuasion, promises, inadvertence, or ignorance.'" *Reyes v. Kelly*, 224 So.2d 303, 305 (Fla. 1969).

"[A trial court] . . . is not authorize[d] . . . to arbitrarily refuse to accept an unqualified plea of guilty made by a defendant in a non-capital case for any other reason.

"There is no more reason to allow such action by a trial judge than there is to allow a defendant to withdraw such a plea at his pleasure. If a trial judge has the discretion to refuse only for cause permission to withdraw a plea of guilty, he should not be allowed, without cause, to reject such a plea. The right to enter such a guilty plea to a noncapital offense should be no less sacred than the right to enter a plea of not guilty."

224 So.2d at 306. See Fla. R. Crim. Proc. 3.160(c) (1975).

Plea bargaining is frequent in capital cases, and the Florida Supreme Court has stated that when a defendant "plead[s] guilty in order to escape the electric chair," he gets "what he bargained for—a life sentence and . . . no right to complain." *Lewis v. State*, 93 So.2d 46, 47 (Fla. 1956). Without guidance or restriction—subject only to defendants' willingness to negotiate—a state attorney is free to make the decision whether a capital charge will be pursued or bargained out. No procedures exist to restrain the employment by different state attorneys of differing standards for the acceptance of less-than-capital guilty pleas, or to monitor or correct the inconsistent or capriciously applied policy of an individual state attorney.

## 3. Jury Discretion.

Although express sentencing discretion is conferred upon the capital trial judge by Fla. Stat. Ann. §921.141 (1975-1976 supp.), see pages 21-60 *supra*, the jury also has unfettered power to spare a capital defendant's life by convicting him of a less-than-capital offense. Petitioner's jury, for example, was charged that it might convict him of



first degree murder (R. 473), second degree murder (R. 476), third degree murder (R. 478), or manslaughter (*ibid.*).

Although these respective crimes are defined in terms of elements that are theoretically distinct and mutually exclusive, the imprecision of the definitions allows a jury wide latitude to shape its guilty verdict so as to avoid or permit the imposition of a death penalty at the sentencing stage. (Such action is made more likely when, as here (R. 105-109, 110-114, 175-176), the jurors are informed on *voir dire* that a death penalty may be the result of a verdict of guilty of first degree murder.) For example, a "premeditated design" to take life "is the *ever-present* distinguishing factor," *Anderson v. State*, 276 So.2d 17, 18 (Fla. 1973) (emphasis in original), of first degree murder:

"[a] premeditated design to effect the death of a human being is a fully formulated and conscious purpose to take human life, formed upon reflection and deliberation, entertained in the mind before and at the time of the homicide. The law does not prescribe the precise period of time which must elapse between the formation of and the execution of the intent to take human life in order to render the design a premeditated one; it may exist only a few moments and yet be premeditated. If the design to take human life was formed a sufficient length of time before its execution to admit of some reflection and deliberation on the part of the party entertaining it, and the party at the time of the execution of the intent was fully conscious of a settled and fixed purpose to take the life of a human being, and of the consequences of carrying such a purpose into execution, the intent or design would be premeditated within the meaning of the law although the execution followed closely upon formulation of the intent."

*McCutchen v. State*, 96 So.2d 152, 153 (Fla. 1957). See also *Purkhiser v. State*, 210 So.2d 448, 449 (Fla. 1968); *Mackiewicz v. State*, 114 So.2d 684, 691 (Fla. 1959). Although "the term 'premeditated design' is not a term of art," *Polk v. State*, 179 So.2d 236, 237 (Fla. App. 1965), and although "[n]o door should be left open for confusion as to what it means," *Anderson v. State, supra*, 276 So.2d at 18, the application of the term in any case involves the drawing of exceedingly fine lines which are sufficiently mobile to reflect the jury's consciousness and concern about the possible death-sentencing consequence of drawing the line here or there. For a "premeditated design" is not simply an intent to kill, *Anderson v. State, supra*, 276 So.2d at 18; *Cook v. State*, 46 Fla. 20, 35 So. 665, 669 (1903), but is rather the formation of an "intent before the act." *Forehand v. State*, 126 Fla. 464, 171 So. 241, 242 (1936). The perpetrator must have "sufficient time . . . fully to frame and to design to kill, and to select the instrument, or to frame the plan to carry this design into execution. . . ." *Lowe v. State*, 90 Fla. 255, 105 So. 829, 831 (1925). There must be time "for some reflection or deliberation upon the matter, for choice to kill or not to kill, resulting in the formation of a deliberate purpose to kill." *Hasty v. State*, 120 Fla. 269, 162 So. 910, 912 (1935). But this elaborate reflective process may be performed—if the jury chooses to so find—in the space of an instant, for "[t]he human mind acts with celerity which it is sometimes impossible to measure." *Cook v. State, supra*, 35 So. at 672. Accordingly, no particular time is necessarily involved: "[a] moment before the act is sufficient." *O'Bryan v. State*, 300 So.2d 323, 325 (Fla. App. 1974); *Hernandez v. State*, 273 So.2d 130, 133 (Fla. App. 1973).

"It is not essential \* \* \* in order to show prima facie premeditation \* \* \* on the part of a prisoner' that there



should be evidence of 'preconceived purpose to kill, formed at a time anterior to the meeting when it was carried into execution.' It is sufficient if the prisoner deliberately determined to kill before inflicting the mortal wound. If there were such purpose deliberately formed, the interval, if only a moment before its execution, is immaterial."

*Lowe v. State, supra*, 105 So. at 831.

Since "all psychological investigation shows that the process of mental conception lies beyond the scrutiny of exact observation," *ibid.*, premeditated design must frequently be proven by circumstantial evidence.

"Premeditation may be inferred from evidence as to the nature of the weapon used, the manner in which the murder was committed and the nature and manner of the wounds inflicted."

*Hernandez v. State*, 273 So.2d 130, 133 (Fla. App. 1973). See also *Larry v. State*, 104 So.2d 352, 354 (Fla. 1958); *Rhodes v. State*, 104 Fla. 520, 140 So. 309, 310 (1932). It may also be inferred:

"from such circumstances as declarations of intent to kill before or after the crime, previous difficulty between the parties, absence of adequate provocation, remarks and conduct indicating preparation, lying in wait, character of the weapon employed, the nature and number of the blows or wounds inflicted, locality of the wounds, place of the crime, and subsequent acts or statements."

*Lowe v. State, supra*, 105 So. at 832. Or it may not be inferred from these same facts.

For second degree murder (but not for manslaughter)<sup>74</sup> the State must establish that a defendant acted with a "depraved mind regardless of human life":

"[d]epravity of mind is an inherent deficiency of moral sense and rectitude . . . . It is the equivalent of the statutory phrase 'depravity of heart' which has been defined to be the highest grade of malice . . . .

"It is obvious . . . that the phrase 'evincing a depraved mind regardless of human life,' as used in the statute . . . denouncing murder in the second degree, was not used in the legal or technical sense of the word 'malice' in the popular or commonly understood sense of ill will, hatred, spite, and evil intent. It is the malice of the evil motive which the statute makes an ingredient of the crime of murder in the second degree."

*Ramsey v. State*, 114 Fla. 766, 154 So. 855, 856 (1934).<sup>75</sup> See also *Huntly v. State*, 66 So.2d 504, 507 (Fla. 1953);

<sup>74</sup> The crime of third degree murder in Florida is not, in terms of its elements, an intermediate offense between manslaughter and second degree murder. Third degree murder is instead a felony murder committed "without any design to effect death" in which the predicate felony is not arson, rape, robbery, burglary, kidnapping, aircraft piracy, or "the unlawful throwing, placing, or discharging of a destructive device or bomb." Fla. Stat. Ann. §782.04(3) (1975-1976 supp.). See *Johnson v. State*, 91 So.2d 185, 187 (Fla. 1956); *Grimes v. State*, 64 So.2d 920, 921 (Fla. 1953); *Tilman v. State*, 81 Fla. 558, 88 So. 377, 378 (1921).

<sup>75</sup> So, the *Ramsey* opinion continues, *ibid.*:

"[h]owever severe the criticism may be of the conduct of the accused in killing young Ellis, it cannot be justly said that it proceeded from an evil motive, from ill will, hatred or spite. It may have sprung from a flame of hottest indignation, outraged decency, humiliating insult, produced by a drunken vulgarian's obscene conduct toward the daughter of his host, but emotions of that kind cannot properly be said to be the product of an evil mind, a vicious, corrupt, base, perverse, malicious motive which may be said to characterize a 'depraved mind regardless of human life.'"

*Luke v. State*, 204 So.2d 359, 362 (Fla. App. 1967); *Darty v. State*, 161 So.2d 864, 873 (Fla. App. 1964); *Smith v. State*, 282 So.2d 179, 189 (Fla. App. 1973); *Bega v. State*, 100 So.2d 455, 457 (Fla. App. 1958).

Every defendant charged with first degree murder has a right to have his jury instructed of its power to convict him alternatively of second degree murder, third degree murder or manslaughter:<sup>76</sup>

"[i]f the indictment or information charges an offense which is divided into degrees, without specifying the degree, the jurors may find the defendant guilty of any degree of the offense charged; if the indictment or information charges a particular degree the jurors may find the defendant guilty of the degree charged or of any lesser degree. The court shall in all such cases charge the jury as to the degrees of the offense."

Fla. R. Crim. Proc. 3.490 (1975).<sup>77</sup> In *Pait v. State*, 112 So.2d 380, 386 (Fla. 1959) the Florida Supreme Court declared: "where first degree murder is charged it is required that the trial judge instruct the jury as to all degrees of unlawful homicide."<sup>78</sup> A trial court's refusal to grant a lesser-degree instruction is reversible error.

<sup>76</sup> In Florida, manslaughter is a lesser "degree" of first degree murder. See *Killen v. State*, 92 So.2d 825, 826-827 (Fla. 1957), quoted n. 79 *infra*.

<sup>77</sup> This rule became effective on February 1, 1973; its predecessor was the identically worded Fla. Stat. Ann. §919.14 (1969).

<sup>78</sup> The right to lesser-degree instructions may be waived, however. *Clements v. State*, 284 So.2d 700 (Fla. 1974) (affirming conviction for first degree murder where the jury had only been instructed on first degree murder; for "trial strategy reasons," 284 So.2d at 701, defense counsel had requested only the first degree murder charge).

*Little v. State*, 206 So.2d 9, 10 (Fla. 1968); *Bailey v. State*, 224 So.2d 296, 299 (Fla. 1969).

Instructions on the lesser included offenses may not be refused by the trial court on the ground that there is no evidence to support them; and a conviction for a lesser offense will be affirmed on appeal despite its lack of evidentiary support.

"This Court is now definitely committed to the rule that wherever evidence is sufficient to sustain a charge of murder in the first degree, whether committed in the perpetration of certain felonies or whether from a specific premeditated design[,] a verdict convicting a defendant of a lesser degree of homicide will not be disturbed even though there is no evidence of the particular degree of the offense for which he might be convicted. We have taken the view that the responsibility of determining the degree of guilt in such cases rests peculiarly within the bosom of the trial jury . . . . [T]he Court should in all cases instruct the jury on the various degrees of the offense charged in the indictment. When the offense charged is first degree murder, whether grounded on specifically alleged premeditated design, or whether committed in the perpetration of certain felonies . . . the defendant is entitled to have the jury advised on all the degrees of unlawful homicide, including manslaughter. There should be a further instruction that it is in the province of the jury to determine the degree."

*Brown v. State*, 124 So.2d 481, 483 (Fla. 1960).<sup>79</sup> The theory upon which convictions of lesser offenses unsupported by

<sup>79</sup> See also *Killen v. State*, 92 So.2d 825, 826-827 (Fla. 1957):

"[a]ppellant contends that manslaughter is not a lesser degree of homicide included in the charge of murder in the first degree when the murder is committed in the perpetration of,

and inconsistent with the evidence are affirmed appears to be that a defendant will not be heard to complain if the jury convicts him of a less severe offense than the crime which is proved. This "jury pardon" is clearly a recognized mechanism for the discretionary dispensation of mercy by the jury:

"[u]nder our system of jurisprudence, the jury had the right to convict defendant of any lesser degree of the crime charged, and it made no difference whether the elements of this degree of the crime were included in the specific allegations of the indictment or information. Such a verdict convicting a defendant of a lesser degree even in the absence of proof is sometimes

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or the attempt to perpetrate, a robbery, and that he should have been found guilty of murder in the first degree or acquitted. We do not consider such to be the law of this State, as this Court consistently has held that where the evidence is sufficient to sustain a charge of murder in the first degree, a verdict convicting a defendant of a lesser degree of unlawful homicide must stand, even though there is no evidence of the particular degree of the offense of which he is convicted. *Riner v. State*, 128 Fla. 848, 176 So. 38; *Ammons v. State*, 88 Fla. 444, 102 So. 642; *Larmon v. State*, 81 Fla. 553, 88 So. 471; *Williams v. State*, 73 Fla. 1198, 75 So. 785; *Johnson v. State*, 55 Fla. 41, 46 So. 174; *Clemmons v. State*, 43 Fla. 200, 30 So. 699; *Morrison v. State*, 42 Fla. 149, 28 So. 97; *Mobley v. State*, 41 Fla. 621, 26 So. 732; *McCoy v. State*, 40 Fla. 494, 24 So. 485; *Brown v. State*, 31 Fla. 207, 12 So. 640."

Affirming a judgment finding appellant guilty of third degree murder, the Florida Supreme Court rejected appellant's contention that the evidence showed that he was either guilty of first degree murder or not guilty of any crime:

"the evidence . . . is ample to have sustained a verdict finding the defendant guilty of a higher degree of murder. Therefore, even if in terms it does not make out a case of murder in the third degree, that furnishes no ground for the granting of a new trial."

*Johnson v. State*, 55 Fla. 41, 46 So. 174, 176 (1908).

referred to as a 'jury pardon' of the highest degree of crime.

*Bailey v. State*, 224 So.2d 296, 297 (Fla. 1968).<sup>80</sup>

#### 4. Executive Clemency.

The Governor, with the "approval of three members of the cabinet" may by executive order commute a death sentence to a sentence of life imprisonment.<sup>81</sup> Although Florida Governors must report their grants of clemency to the legislature,<sup>82</sup> there are no standards whatsoever for the exercise of the commutation power. The reduction of a legally authorized sentence is committed to the unfettered discretion of the executive branch. *Davis v. State*, 123 So.2d 703, 711 (Fla. 1960), *LaBarbera v. State*, 63 So.2d 654, 655 (Fla. 1953); *Johnson v. State*, 61 So.2d 179 (Fla.

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<sup>80</sup> Other discretionary jury decisions may also spare the life of a capital offender. In a first degree murder case, the jury may be instructed on lesser-included-offenses in addition to second degree murder, third degree murder, and manslaughter, depending on the accusatory pleading and the evidence at trial. See generally, *Gilford v. State*, 313 So.2d 729 (Fla. 1975) ("the probata must conform to the *allegata*. The one exception to this is . . . those instances where the offense is divided into *degrees*, without specifying the degrees, and in that instance the trial judge is mandated [by Fla. R. Crim. Proc. 3.490 (1975)] to instruct on such lesser *degrees* of a single offense." 313 So.2d at 732-733 (emphasis in original)). A jury may convict of a non-capital attempt, Fla. R. Crim. Proc. 3.510 (1974-1975 supp.); it may recognize an amorously defined defense such as insanity, see, e.g., *Davis v. State*, 44 Fla. 32, 32 So. 822 (1902); *Perry v. State*, 143 So.2d 528 (Fla. App. 1962), or self-defense, see, e.g., *Linsley v. State*, 88 Fla. 135, 101 So. 273 (1924), or mitigation such as intoxication, see, e.g., *Gardner v. State*, 28 Fla. 113, 9 So. 835 (1891); it may find that a homicide is justifiable, see Fla. Stat. Ann. §§776.012, 776.021, 776.031 (1975-1976 supp.); or excusable, see Fla. Stat. Ann. §782.03 (1965); or it may simply refuse to convict in spite of the evidence—a recognized phenomenon when the death penalty is involved, see Petitioner's *Fowler* Brief, at pp. 90-92, n.133.

<sup>81</sup> Fla. Const., art. 4, §8(a) (1968 rev.).

<sup>82</sup> Fla. Stat. Ann. §940.01(3) (1973).



1952); *Sawyer v. State*, 148 Fla. 542, 4 So.2d 713 (1941); *Chavigny v. State*, 112 So.2d 910, 915 (Fla. App. 1959).

The power of the Governor to commute a death sentence has been likened to the power of a pre-*Furman* jury to make a recommendation of mercy in any capital case:

"[t]he matter of reducing the penalty in convictions for murder in the first degree is within the province of the trial jury, in the first instance, and the power of commutation from the extreme penalty to imprisonment for life lies with the authority designated in the Constitution. Article 4 [defining powers of the Governor] . . . ."

*Baker v. State*, 137 Fla. 27, 188 So. 634 (1939). The executive has "broad and wide discretion in . . . commuting punishments," *Ex parte White*, 161 Fla. 85, 178 So. 876, 880 (1938)—so much so that the Florida Supreme Court has declared unconstitutional a statute which required the Governor and his cabinet (who constituted the Board of Pardons under the 1885 Constitution) to afford clemency any time the Court affirmed a death sentence by an equally divided court. *Ibid.*<sup>83</sup>

. . . .

All together, Florida law from indictment to electrocution is "honey-combed with discretion"<sup>84</sup> that not merely permits but inevitably entails an arbitrary infliction of the harshest punishment known—or partly known—to man.

<sup>83</sup> The only study dealing with the actual exercise of the commutation power in Florida of which we are aware discloses that, between 1960 and 1962, nine death sentences were executed while three were commuted. Note, *Executive Clemency in Capital Cases*, 39 N.Y.U. L. REV. 136, 191 (1964).

<sup>84</sup> White, *The Role of the Social Sciences in Determining the Constitutionality of Capital Punishment*, 45 AM. J. ORTHOPSYCHIATRY 581, 587 (1975).

"[T]he decisions on charging, on acceptance of guilty plea, on determination of the offense for which conviction is warranted, on sentencing, and on executive clemency add up to a process containing too much chance for mistake and too much standardless 'discretion' for it to be decent for us to use it any longer as a means of choosing for death. . . .

"Suppose all the mistake-proneness and standardlessness . . . were concentrated in the decision of one man. We would regard that as so evidently intolerable as to be undiscussable. But it might be better than what we have, for responsibility would at least be fixed. All our system does is to diffuse this same responsibility nearly to the point of its elimination, so that each participant in this long process, though perhaps knowing his own conclusions to be uncertain and inadequately based on lawful standards, can comfort himself with the thought, altogether false and vain, that the lack has been made up, or will be made up, somewhere else."<sup>85</sup>

There is nowhere else. "The law itself must save the parties' rights and not leave them to the discretion of the courts as such." *Louisville & Nashville Ry. Co. v. Central Stock Yards Co.*, 212 U.S. 132, 144 (1909). Nor yet to the discretion of prosecutors, jurors, two tiers of judges, and the governor. This, at the very least, *Furman* must hold.

<sup>85</sup> BLACK, *op cit.* *supra* note 35, at 92-93.

**III.****The Excessive Cruelty of Death.**

The submissions made in Part III of Petitioner's *Fowler* Brief, at pp. 102-140, and in Part III of the Brief for Petitioner, *Jurek v. Texas*, No. 75-5394, are fully applicable to death sentences inflicted under Florida law. *Amicus* respectfully urges their consideration by the Court.

**CONCLUSION**

The penalty of death imposed upon petitioner Charles William Proffitt is a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments. The judgment of the Supreme Court of Florida should therefore be reversed insofar as it affirms his death sentence.

Respectfully submitted,

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**APPENDIX**

## APPENDIX A

The following persons have been sentenced to death under Florida's 1972 capital punishment legislation; the race of each defendant appears in parenthesis.

1. *Eligaah Ardalle Jacobs* (white), sentenced to death for first degree murder, two counts, February 13, 1976, Pasco County Cir. Ct., No. 74-1408 (jury recommended death).
2. *John A. Kampff* (white), sentenced to death for first degree murder, January 23, 1976, St. Lucie County Cir. Ct., No. 75-338-CF-A (jury recommended death) *appeal pending* [no Fla. Sup. Ct. number assigned yet].
3. *Richard Henry Gibson* (black), sentenced to death for first degree murder, January 6, 1976, Duval County Cir. Ct., No. 75-227-CF-R (jury recommended death) *appeal pending*, Fla. Sup. Ct. No. 48,698.
4. *Jesse Ray Rutledge* (black), sentenced to death for first degree murder, December 31, 1975, Alachua County Cir. Ct., No. 75-457-CF (jury recommended death) *appeal pending*, Fla. Sup. Ct. No. 48,801.
5. *Michael Salvatore* (white), sentenced to death for first degree murder, December 2, 1975, Dade County Cir. Ct., No. 75-2161-B (jury recommended death) *appeal pending* [no Fla. Sup. Ct. No. assigned yet].
6. *Monroe Holmes* (black), sentenced to death for first degree murder, November 7, 1975, Palm Beach



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County Cir. Ct., No. 74-1035-CF (waived sentencing jury) *appeal pending*, Fla. Sup. Ct. No. 48,392.

7. *Glen Martin* (black), sentenced to death for first degree murder, October 10, 1975, Volusia County Cir. Ct., No. 75-535 (jury recommended death) *appeal pending*, Fla. Sup. Ct., No. 48,464.
8. *Charles K. Foster* (white), sentenced to death for first degree murder, October 4, 1975, Bay County Cir. Ct., No. 75-486 (jury recommended death) *appeal pending*, Fla. Sup. Ct., No. 48,380.
9. *Raymond Stone* (white), sentenced to death for first degree murder, October 1, 1975, Union County Cir. Ct., No. 74-71 (jury recommended death) *appeal pending*, Fla. Sup. Ct., No. 48,275.
10. *Sampson A. Armstrong* (black), sentenced to death for first degree murder, September 30, 1975, Hardee County Cir. Ct., No. 75-110 (jury recommended death) *appeal pending*, Fla. Sup. Ct. No. 48,516.
11. *Earl Enmond* (black), sentenced to death for first degree murder, September 30, 1975, Hardee County Cir. Ct., Nos. 75-122 and 75-123, (jury recommended death) *appeal pending*, Fla. Sup. Ct., No. 48,525.
12. *Carl Jackson* (black), sentenced to death for first degree murder, September 12, 1975, Bay County Cir. Ct., No. 75-258 (jury recommended death) *appeal pending*, Fla. Sup. Ct., No. 48,165.
13. *Danny Gafford* (white), sentenced to death for first degree murder, September 7, 1975, Bay County Cir.

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Ct., No. 75-410 (jury recommended death) *appeal pending*, Fla. Sup. Ct., No. 48,421.

14. *James David Raulerson* (white), sentenced to death for first degree murder, August 29, 1975, Duval County Cir. Ct., No. 75-1325-CF-P (jury recommended death) *appeal pending*, Fla. Sup. Ct., No. 47,991.
15. *Franz Peter Buckrem* (white), sentenced to death for first degree murder, August 15, 1975, Sarasota County Cir. Ct., No. 75-284-CF-A (jury recommended mercy) *appeal pending*, Fla. Sup. Ct., No. 48,029.
16. *Henry Brown* (black), sentenced to death for first degree murder, August 1, 1975, Dade County Cir. Ct., No. 73-6666-B (jury recommended mercy) *appeal pending*, Fla. Sup. Ct., No. 48,229.
17. *John W. LeDuce* (white), sentenced to death for first degree murder, July 28, 1975, Okaloosa County Cir. Ct., No. 75-53 (jury recommended death) *appeal pending*, Fla. Sup. Ct., No. 47,953.
18. *David Livingston Funchess* (black), sentenced to death for first degree murder, July 18, 1975, Duval County Cir. Ct. No. 75-169-CF-R (jury recommended death) *appeal pending*, Fla. Sup. Ct., No. 47,828.
19. *Lenson Hargrave* (white), sentenced to death for first degree murder, July 18, 1975, Dade County Cir. Ct., No. 75-118-A (jury recommended death) *appeal pending*, Fla. Sup. Ct., No. 48,135.

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20. *Glen Chambers* (white), sentenced to death for first degree murder, July 11, 1975, Sarasota County Cir. Ct., No. 75-95-CF-A (jury recommended mercy) *appeal pending*, Fla. Sup. Ct., No. 47,888.
21. *Benjamin F. Huckaby* (white), sentenced to death for first degree murder, June 26, 1975, Volusia County Cir. Ct., No. 74-883-B (jury recommended death) *appeal pending*, Fla. Sup. Ct., No. 47,736.
22. *Rudolph Valentine Lee* (black), sentenced to death for first degree murder, June 12, 1975, Duval County Cir. Ct., No. 72-10 (jury recommended death) *appeal pending*, Fla. Sup. Ct., No. 47,690.
23. *Leslie R. Jones* (black), sentenced to death for first degree murder, May 15, 1975, Escambia County Cir. Ct., No. 74-1810 (jury recommended mercy) *appeal pending*, Fla. Sup. Ct., No. 47,472.
24. *Thomas Knight* (black), sentenced to death for first degree murder, April 21, 1975, Dade County Cir. Ct., No. 74-5978 (jury recommended death) *appeal pending*, Fla. Sup. Ct., No. 47,599.
25. *Edward Clark Barclay* (black), sentenced to death for first degree murder, April 10, 1975, Duval County Cir. Ct., No. 74-4139-CF (jury recommended death) *appeal pending*, Fla. Sup. Ct., No. 47,260.
26. *Jacob John Dougan* (black), sentenced to death for first degree murder, April 10, 1975, Duval County Cir. Ct., No. 74-4139-CF (jury recommended death) *appeal pending*, Fla. Sup. Ct., No. 47,260.

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27. *William Duane Elledge* (white), sentenced to death for first degree murder, March 27, 1975, Broward County Cir. Ct., No. 75-0087-CF (jury recommended death) *appeal pending*, Fla. Sup. Ct., No. 48,081.
28. *Delbert Tibbs* (black), sentenced to death for first degree murder, March 24, 1975, Lee County Cir. Ct., No. 74-254-CF (jury recommended death) *appeal pending*, Fla. Sup. Ct., No. 47,258.
29. *Douglas Meeks* (black), sentenced to death for first degree murder, March 12, 1975, Taylor County Cir. Ct., No. 74-2990-CF (jury recommended death) *appeal pending*, Fla. Sup. Ct., No. 47,533; sentenced to death for first degree murder, June 4, 1975, Taylor County Cir. Ct., No. 74-300-CF (jury recommended death) *appeal pending*, Fla. Sup. Ct., No. 47,533.
30. *William L. Harvard* (white), sentenced to death for first degree murder, March 6, 1975, Brevard County Cir. Ct., No. 74-713-CF-A (jury recommended death) *appeal pending*, Fla. Sup. Ct., No. 47,052.
31. *Clarence R. Purdy* (white), sentenced to death for rape, February 12, 1975, Lake County Cir. Ct., No. 74-561 (jury recommended death) *appeal pending*, Fla. Sup. Ct., No. 47,074.
32. *Levis Leon Aldrich* (white), sentenced to death for first degree murder, January 8, 1975, St. Lucie County Cir. Ct., No. 74-335-CF-A (jury recommended death) *appeal pending*, Fla. Sup. Ct., No. 46,958.

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33. *Alvin Bernard Ford* (black), sentenced to death for first degree murder, January 6, 1975, Broward County Cir. Ct., No. 74-2159-CF-A (jury recommended death) *appeal pending*, Fla. Sup. Ct., No. 47,059.
34. *Charles Messer* (white), sentenced to death for first degree murder, January 3, 1975, Santa Rosa County Cir. Ct., No. 74-I-21 (jury recommended death) *appeal pending*, Fla. Sup. Ct., No. 46,849.
35. *Ronald Jackson* (black), sentenced to death for first degree murder, December 23, 1974, Dade County Cir. Ct., No. 74-6666-B (jury recommended death) *appeal pending*, Fla. Sup. Ct., No. 48,229.
36. *Clyde Foster* (black), sentenced to death for first degree murder, December 14, 1974, Columbia County Cir. Ct., No. 74-248-CF (jury recommended death).
37. *George Thomas Vasil* (white), sentenced to death for first degree murder, December 12, 1974, St. Lucie County Cir. Ct., No. 74-336-CF-A (jury recommended death) *appeal pending*, Fla. Sup. Ct., No. 46,654.
38. *Walter Albert Carnes* (black), sentenced to death for first degree murder, November 19, 1974, Escambia County Cir. Ct., No. 74-2131-CF (jury recommended mercy) *conviction aff'd., death sentence vacated*, Fla. Sup. Ct., No. 46,673.
39. *Michael Edward Provence* (white), sentenced to death for first degree murder, October 31, 1974, Manatee County Cir. Ct., No. 73-4195 (jury recommended mercy) *appeal pending*, Fla. Sup. Ct., No. 46,671.

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40. *James Calvin Agan* (white), sentenced to death for first degree murder, September 27, 1974, Hillsborough County Cir. Ct., No. 74-1687, Div. A. (waived sentencing jury) *appeal pending*, Fla. Sup. Ct., No. 48,052.
41. *Mac Reed Tedder II* (black), sentenced to death for first degree murder, July 26, 1974, Hernando County Cir. Ct., No. 74-26 (jury recommended mercy) *aff'd*, 322 So.2d 908 (Fla. 1975).
42. *Joseph G. Brown* (black), sentenced to death for first degree murder, July 3, 1974, Hillsborough County Cir. Ct., No. 73-2180-C (jury recommended death) *appeal pending*, Fla. Sup. Ct., No. 46,925.
43. *Vernon R. Cooper* (white), sentenced to death for first degree murder, July 1, 1974, Escambia County Cir. Ct., No. 74-185 (jury recommended death) *appeal pending*, Fla. Sup. Ct., No. 45,966.
44. *James Dupree Henry* (black), sentenced to death for first degree murder, June 26, 1974, Orange County Cir. Ct., No. 74-953 (jury recommended death) *appeal pending*, Fla. Sup. Ct., No. 46,105.
45. *James Curtis McCrae* (black), sentenced to death for first degree murder, May 21, 1974, Lee County Cir. Ct., No. 73-636-CF (jury recommended mercy) *appeal pending*, Fla. Sup. Ct., No. 45,894.
46. *Thomas A. Halliwell* (white), sentenced to death for first degree murder, May 10, 1974, Hillsborough County Cir. Ct., No. 74-286 (jury recommended



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death) *aff'd.*, Fla. Sup. Ct., No. 45,885 (December 3, 1975).

47. *Ernest John Dobbert* (white), sentenced to death for first degree murder, April 12, 1974, Duval County Cir. Ct., No. 73-5068-5 (jury recommended mercy) *aff'd.*, Fla. Sup. Ct., No. 45,558 January 14, 1976.
48. *Gary Eldon Alvord* (white), sentenced to death for first degree murder, April 9, 1974, Hillsborough County Cir. Ct., No. 73-13986 (jury recommended death) *aff'd.*, 322 So. 2d 533 (Fla. 1975).
49. *Darius Slater* (black), sentenced to death for first degree murder, April 4, 1974, Orange County Cir. Ct., No. 73-2065 (jury recommended mercy) *conviction aff'd.*, *death sentence vacated*, 316 So.2d 539 (Fla. 1975).
50. *Jon Steven Miller* (white), sentenced to death for first degree murder, April 1, 1974, Lee County Cir. Ct., No. 72-251-F (jury recommended death) *appeal pending*, Fla. Sup. Ct., No. 45,689.
51. *Jackson B. Burch* (black), sentenced to death for first degree murder, March 29, 1974, Palm Beach County Cir. Ct., No. 73-885 (jury recommended mercy) *appeal pending*, Fla. Sup. Ct., No. 45,359.
52. *Charles William Proffitt* (white), sentenced to death for first degree murder, March 24, 1974, Hillsborough County Cir. Ct., No. 73-1397 (jury recommended death) *aff'd.*, 315 So.2d 461 (Fla. 1975) *cert. granted*, 44 U.S.L.W. 3439, January 22, 1976.

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53. *James Adams* (black), sentenced to death for first degree murder, March 15, 1974, St. Lucie County Cir. Ct., No. 73-284-CF-A (jury recommended death) *appeal pending*, Fla. Sup. Ct., No. 45,450.
54. *Lloyd Swan* (black), sentenced to death for first degree murder, March 1, 1974, Dade County Cir. Ct., No. 73-5039 (jury recommended mercy), *conviction aff'd.*, *death sentence vacated*, 322 So.2d 485 (Fla. 1975).
55. *Carl Ray Songer* (white), sentenced to death for first degree murder, February 28, 1974, Osceola County Cir. Ct., No. 74-27 (jury recommended death) *aff'd.*, 322 So.2d 481 (Fla. 1975), *pending on petition for certiorari*, No. 75-5800.
56. *Johnny Paul Witt* (white), sentenced to death for first degree murder, February 21, 1974, Volusia County Cir. Ct., No. 74-181 (jury recommended death) *appeal pending*, Fla. Sup. Ct., No. 45,796.
57. *Willie Jasper Darden* (black), sentenced to death for first degree murder, January 23, 1974, Citrus County Cir. Ct., No. 73-2027-C (jury recommended death) *aff'd.*, Fla. Sup. Ct., Nos. 45,108 and 45,056 (February 18, 1976).
58. *Larry Thompson* (black), sentenced to death for first degree murder, January 11, 1974, Orange County Cir. Ct., No. 73-2386 (jury recommended mercy), *conviction aff'd.*, *death sentence vacated*, Fla. Sup. Ct., No. 45,107 (January 21, 1976).

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59. *Daniel Wilber Gardner* (white), sentenced to death for first degree murder, January 30, 1974, Citrus County Cir. Ct., No. 73-132 (jury recommended mercy) *aff'd.* 313 So.2d 675 (Fla. 1975), *pending on petition for certiorari*, No. 74-6593.
60. *John A. Spinkellink* (white), sentenced to death for first degree murder, December 20, 1973, Leon County Cir. Ct., No. 73-138 (jury recommended death) *aff'd.*, 313 So.2d 666 (Fla. 1975), *pending on petition for certiorari*, No. 75-5209.
61. *Otis Terry Williams* (black), sentenced to death for first degree murder, December 6, 1973, Orange County Cir. Ct., No. CR 73-2039 (jury recommended mercy) *appeal pending*, Fla. Sup. Ct., No. 45,010.
62. *James R. McCaskill* (black), sentenced to death for first degree murder, December 6, 1973, Orange County Cir. Ct., No. CR 73-1979 (jury recommended mercy) *appeal pending*, Fla. Sup. Ct., No. 45,009.
63. *Howard Virgil Douglas* (white), sentenced to death for first degree murder, December 4, 1973, Polk County Cir. Ct., No. 73-1632-CF-C (jury recommended mercy), *aff'd.*, Fla. Sup. Ct., No. 44,864, February 18, 1976.
64. *Robert Sullivan* (white), sentenced to death for first degree murder, November 12, 1973, Dade County Cir. Ct., No. 73-3236 (jury recommended death) *aff'd.*, 303 So.2d 632 (Fla. 1974), *pending on petition for certiorari*, No. 74-6377.

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65. *Clifford Hallman* (white), sentenced to death for first degree murder, November 11, 1973, Hillsborough County Cir. Ct., No. 73-1685 (jury recommended death) *aff'd.*, 305 So.2d 180 (Fla. 1974) *pending on petition for certiorari*, No. 74-6168.
66. *Leo Learie Alford* (black), sentenced to death for first degree murder, October 16, 1973, Palm Beach County Cir. Ct., No. 73-159-CF (jury recommended death), *aff'd.*, 307 So.2d 433 (Fla. 1975), *pending on petition for certiorari*, No. 74-671.
67. *Anthony Lee Sawyer* (black), sentenced to death for first degree murder, October 15, 1973, Dade County Cir. Ct., No. 73-1001 (jury recommended mercy), *aff'd.*, 313 So.2d 680 (Fla. 1975), *pending on petition for certiorari*, No. 74-6563.
68. *Jimmie Lee Jones* (black), sentenced to death for first degree murder, September 28, 1973, Pasco County Cir. Ct., No. 73-326 (jury recommended mercy), *appeal pending*, Fla. Sup. Ct., No. 44,669.
69. *Joseph Taylor* (black), sentenced to death for first degree murder, July 27, 1973, Broward County Cir. Ct. No. 73-261-CF (jury recommended mercy) *conviction aff'd.*, *death sentence vacated*, 294 So.2d 698 (Fla. 1974).
70. *Michael LaMadline* (white), sentenced to death for first degree murder, July 24, 1973, Okaloosa County Cir. Ct., No. 73-60 (no sentencing jury), *conviction aff'd.*, *death sentence vacated* 303 So.2d 17 (Fla. 1974).

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**In the  
Supreme Court of the United States**

OCTOBER TERM, 1975

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NO. 75-5706

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CHARLES WILLIAM PROFITT,  
*Petitioner*

vs.

STATE OF FLORIDA,  
*Respondent.*

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On Writ of Certiorari  
to the Supreme Court of Florida

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BRIEF OF THE  
COLORADO STATE PUBLIC DEFENDER  
AS AMICUS CURIAE

---

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CHARLES WILLIAM PROFITT,  
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On Writ of Certiorari  
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BRIEF OF THE  
COLORADO STATE PUBLIC DEFENDER SYSTEM  
AS AMICUS CURIAE

The Colorado Public Defender System files this brief Amicus Curiae pursuant to the written consent of the parties, and such consents have been filed with the Clerk of the Supreme Court.

INTEREST OF AMICUS CURIAE

The Colorado State Public Defender System is a statutorily created agency of the State of Colorado. The Defender System has the duty of representing indigent persons accused of felonies, misdemeanors, juvenile delinquency, mental health proceedings, appellate and post-conviction proceedings. The Colorado Public Defender System

consists of 78 lawyers, 14 investigators and the necessary secretarial personnel to fulfill their task of representing indigent persons accused of criminal misconduct.

In its effort to create a constitutional post-*Furman* death penalty statutory scheme the Colorado Legislature enacted Colorado Revised Statutes 16-11-103, 18-3-102, and 18-3-103. (See Appendix B). These statutes became effective January 1, 1975 and were patterned after and are very similar to the Florida death penalty statutes. ( See Appendix A).

Since January of 1975, the Colorado Public Defender System has represented 25 persons accused of first degree murder who faced the possibility of the death penalty. The system is currently representing 20 persons charged with first degree murder who now face the possibility of the death penalty. The appellate division of the Colorado State Public Defender System is now representing one convicted person on death row who has been sentenced to death. The Colorado State Public Defender System is committed to the philosophy that the death penalty is a cruel and unusual penalty and is violative of the provision of the Eighth Amendment and that the statutory schemes enacted by the States of Florida and Colorado do not preclude unfettered discretion that was held unconstitutional in *Furman v. Georgia*, 408 U.S. 238-1972).

Because of the similarity of the Florida and Colorado statutes the fate of our clients will be affected by the Court's decision in the within case.

#### OPINION BELOW

The Opinion of the Supreme Court of Florida is reported at 315 So.2d 461 (Fla. 1975).

#### JURISDICTION

Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. Section 1257(3).

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States. The relevant Florida statutes are:

Fla. Stat. Ann. Sections 755.082, 782.04, 921.141 (all appearing in 1974-1975 Supp.). (See Appendix A)

The relevant Colorado Statutes are Colorado Revised Statutes 16-11-103, 18-3-102, and 18-3-103. (See Appendix B)

### QUESTION PRESENTED

Does the Florida statutory death penalty scheme preclude the arbitrary, discretionary and discriminatory determination of what convicted murderer lives or dies?

### STATEMENT OF THE CASE

The Colorado State Public Defender System adopts the Petitioner's statement of the case.

### ARGUMENT

#### I. THE FLORIDA STATUTORY DEATH PENALTY SCHEME DOES NOT PRECLUDE THE ARBITRARY, DISCRIMINATORY, DISCRETIONARY DETERMINATION OF WHICH CONVICTED MURDERER SHALL LIVE OR DIE.

Fla. Stat. Section 921.141 provides that "upon conviction or adjudication of guilt of a defendant of a capital felony the court *shall* conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment\* \* \*". That statute goes on to provide that after hearing all the evidence the jury *shall* deliberate and render an advisory sentence to the court. (emphases added)



Likewise, Colorado Revised Statute 16-11-103 provides that "upon conviction of guilt of a defendant of a class 1 felony, the trial court *shall* conduct a separate sentencing hearing to determine whether the defendant should be sentenced to death or life imprisonment." The Colorado statute goes on to provide that "after hearing all the evidence the jury shall deliberate and render a verdict\* \* \* as to the existence or nonexistence of the aggravating or mitigating factors and if a mitigating factor exists the Court *shall* sentence the defendant to life imprisonment. If no mitigating factors exist and any one of the aggravating factors are found to exist the Court *shall* sentence the defendant to death." (emphasis added)

A brief review of a number of first degree murder cases that have been resolved by the Colorado criminal justice system clearly reveals that who gets life and who gets death is still "freakishly" arbitrarily and discriminatorily determined and the unfettered discretion of the prosecutor notwithstanding the statutory "*shall*" is the major factor in that determination.

In the El Paso County District Court, Colorado Springs, Colorado, in the case of *People v. Mitchell Martin* and *Michael Corbett*, No. 22668, the two named defendants were charged with first degree murder after deliberation. Discovery in the case revealed that the victim, one Ricky Lewis, was killed during a dice game when two assailants armed with shotguns came upon the game and started firing at the participants. Lewis was killed and five bystanders were wounded. The evidence revealed that there were expended twelve gauge and twenty gauge shotgun shells in the area. Through the plea bargaining process and an agreement of immunity in exchange for Martin's testimony against Corbett, the co-defendant Martin was permitted to plead guilty to accessory after the fact of first degree murder. Martin was then sentenced to the Colorado State Reformatory for an indeterminate period of time to a maximum of ten years.

Discovery evidence clearly indicated that Martin owned and possessed on that evening a twenty gauge shotgun and

Corbett owned and possessed a twelve gauge shotgun. Approximately six weeks before trial, the defense requested production of the shotguns and expended shells for testing. The prosecutor then conducted the necessary ballistics tests and found that the victim had died from pellets from the twenty gauge shotgun shell and none of the twelve gauge pellets penetrated any of the victims.

Mitchell is serving an indeterminate to ten years in the Colorado State Reformatory and Michael Corbett still faces charges of first degree murder and the possible death penalty. This case is included in our brief to illustrate the inherent injustice in letting the prosecutor's discretion be a major factor in determining who get the death penalty and also to illustrate the point that the prosecutor's discretion is not always that discreet.

In El Paso County, Colorado, in the case of the *People v. Howard Buckner*, Case No. 27750, Buckner was charged with first degree murder. Discovery indicated that the deceased and Buckner had words about the attentions of a certain young lady. Discovery evidence also indicated that the deceased was armed and had fired his weapon and it was a question of who started firing first. There was also evidence that the victim was shot in the back.

Notwithstanding the Colorado statutory provision, the District Attorney announced that he was not seeking the death penalty and a stipulation was entered into between counsel and approved by the court that the death penalty would not be an alternative for the jury in that case. The text of that stipulation is attached hereto as an Appendix C.

In El Paso County, Colorado, in Criminal Action No. 22784, Michael Corbett stands charged with murder after deliberation and felony murder in connection with the death of Daniel Howard VanLone. In a companion case, Freddie Glenn stands charged with the same homicide.

Information obtained through discovery indicates that Michael Corbett, Freddie Glenn, and Larry Dunn went to the Four Seasons Motel area with the intention of committing a robbery. The deceased, a cook, came out of the rear of the restaurant area after his shift had been completed about ten thirty in the evening, and that the three defendants at gun point put the deceased in their car, drove him down a road about one mile from the establishment, robbed him of fifty cents, and then shot the victim in the head killing him.

The El Paso County District Attorney's office has granted Larry Dunn complete immunity for his involvement in this offense in exchange for his testimony against Glenn and Corbett.

Even though the evidence indicates that Dunn's involvement may be more serious than either of the other defendants, the District Attorney has passed judgment that Dunn will live and not be prosecuted for any criminal activity in connection with this incident and that same office is vigorously seeking the death penalty against Corbett and Glenn.

In the City and County of Denver District Court in Case No. Cr. 4418, being styled *People v. Dennis Floyd King*, King was charged with felony murder and rape in connection with the rape and murder of one Barbara Benzin, which occurred in the City and County of Denver on March 28, 1975.

The discovery information indicated that the victim had been raped and that after the rape she had been strangled to death. The Defendant was apprehended in California approximately six months later and found possessing the credit cards of the victim. The defendant after being properly advised made a full confession of his participation in the offense. The defendant was returned to Colorado for trial and pursuant to plea bargaining defendant was permitted to plead guilty to second degree murder and he received a sentence from seventeen to fifty years in the Colorado State Penitentiary.

In *People vs. Robert Lee Romero*, Denver District Court, No. Cr. 4401, the defendant was charged with murder in the

first degree, conspiracy to commit murder and criminal attempt involving the death of Ruth V. Jordan. The offense was alleged to have occurred on the 31st day of July, 1975. In a companion case styled the *People vs. Gilbert Florentino Valerio*, No. Cr. 4398, Valerio was charged with the same offenses involving the same homicide.

Information obtained at the preliminary hearing revealed that Valerio and Romero went to the parking lot of the motel and restaurant. Two ladies were leaving the restaurant area headed toward their automobiles and Valerio accosted Ruth V. Jordan and Romero accosted the other lady, apparently with the thought of taking their purses away from them. In the course of the altercation, Romero was thwarted in his efforts and ran away and Valerio who was armed with a pistol, shot and killed Mrs. Jordan.

The evidence was that Romero had not even assaulted or accosted the victim of the homicide. Notwithstanding Colorado statutory procedure, prior to the commencement of the trial the district attorney and the defense attorney stipulated in writing the prosecutor would not seek the death penalty and the stipulation was approved by the court. (See Appendix D) At the conclusion of Romero's trial, he was found guilty of first degree murder, attempted robbery and conspiracy to commit robbery and pursuant to the stipulation no penalty hearing was held. Romero was sentenced to life imprisonment in the Colorado State Penitentiary.

Pursuant to plea bargaining defendant Valerio, who actually killed Mrs. Jordan, entered a plea of guilty to second degree murder and was sentenced to the Penitentiary for a term of not less than thirty-five nor more than fifty years.

In *People vs. Richard Thiery*, Denver District Court, No. Cr. 4782. Thiery was charged with felony murder and aggravated robbery.

Evidence at the preliminary hearing revealed that Thiery had entered a tavern wearing a ski mask carrying a loaded gun. He held up approximately twenty people in the



tavern, taking their money and the cash box from the proprietor. There was evidence that after the robbery, while Thiery was backing out of the tavern, he coldly shot a patron in the head and the patron died. There was other evidence that a patron grabbed at Thiery as he was backing out of the tavern and hit Thiery's arm and the gun was discharged killing the patron.

As a result of plea bargaining Thiery was permitted to plead guilty to second degree murder. The court sentenced him to a term not less than twenty years nor more than fifty years and the charges of first degree and aggravated robbery were dismissed.

In *People vs. Ernest A. Vialpando*, Denver District Court No. 91326, defendant was charged with two counts of first degree murder involving two separate victims. He was charged with killing the victims after deliberation.

The evidence at the preliminary hearing indicated that Mr. Vialpando had previously exchanged words with the victim Juarez and had accused Juarez of stealing his television set. On the fatal morning, Juarez and one Lovato were in an after hours drinking establishment and were told that Vialpando wanted to see them. They drove to his house with two of Juarez's sisters. Upon arriving they were invited into the house and upon their entering the house, Lovato went to the bathroom, Vialpando followed him into the bathroom and shot him in the back. The defendant then came out into the living room and shot Juarez three times in the chest. Vialpando was examined by three psychiatrists; two found him to be sane and one found him temporarily insane due to the ingestion of alcohol and the smoking of marijuana. Through the plea bargaining process Mr. Vialpando was permitted to plead guilty to second degree murder in connection with the Lovato killing and manslaughter in connection with the Juarez killing. The district attorney had determined that Vialpando should not get the death penalty. Vialpando was sentenced to concurrent sentences of indeterminate to ten and twelve and one-half years to forty years in the Colorado State Penitentiary.

In *People vs. Holland*, Case No. C. 5994 in the Adams County District Court, Holland was charged with first degree murder in connection with the death of Delores Hall.

Evidence at the preliminary hearing indicated that Holland and David Harding were friends. Holland on the night in question had a date with Delores Hall. After they left a tavern, Holland endeavored to rob Delores Hall. Holland shot her twice with a twenty-two caliber pistol, killed her and dumped her out of her car. The evidence indicated that Holland then returned to the motel where he and Harding were staying. He told Harding what had taken place and they went to Delores Hall's home in her automobile. Then with her keys gained entrance into her home where they burglarized her home and stole a number of items of personal property. They then took Delores Hall's automobile and fled to Albuquerque, New Mexico where Holland perpetrated two robberies.

Harding contacted the Albuquerque police authorities, told them about the two local robberies, and of the fact Holland was wanted for a murder in Colorado. Holland was apprehended and returned to Colorado for prosecution.

Through plea bargaining, Holland was permitted to plead guilty to first degree life and in consideration of that plea the two New Mexico robberies were dropped, a City and County of Denver felony assault case was dropped and the Federal Government agreed not to prosecute Holland on 36 counts of forgery.

In the same jurisdiction, Adams County Colorado, in Case No. C-5713 entitled the *People vs. Dean Wildermuth*, Wildermuth was charged with first degree murder. Evidence at the trial revealed that Wildermuth had met the victim in a tavern. They had drinks together and the victim agreed to give Wildermuth a ride home. The victim and Wildermuth went to the victim's apartment where Wildermuth attempted to rob her. Wildermuth sexually assaulted the victim and stabbed her to death. After the fatal wound was inflicted, Wildermuth superficially scratched a swastika in the victim's nude chest. Like Holland, Wildermuth took the victim's automobile and



some personal effects from the victim's house and fled in the victim's car to another state. He was apprehended with her car and returned to the State of Colorado for prosecution on the felony murder charges.

Wildermuth had no other charges pending against him however he could have been charged with assaulting a Kansas filling station operator in connection with his apprehension there. Plea bargaining was unsuccessful in Wildermuth's case and he went to trial on the first degree murder charge and was convicted of first degree murder. The jury found there were no mitigating circumstances and found that the homicide was committed in a particularly heinous manner. Wildermuth has been sentenced to death and is now the only resident of Colorado's Death Row.

In *Furman vs. Georgia*, supra, the majority of the Court agreed that the death penalty is a cruel and unusual punishment because it is imposed infrequently and under no clear standards. The majority of the Court also agree that the purpose of the death penalty, whether it be retribution or deterrence, cannot be achieved when it is so rarely and unpredictably used. The purpose of the Eighth and Fourteenth Amendments is to bar legislatures from imposing punishments like the death penalty which, because of the way they are administered serve no valid social purpose.

We respectfully submit that the foregoing Colorado cases clearly indicate that there is no uniform standard in Colorado as to who should or who will get the death penalty.

In analyzing the cases of Dennis Floyd King, David Holland and Dean Wildermuth, it is apparent that there is a great deal of similarity in the offenses. Each defendant robbed and killed a woman and King and Wildermuth also sexually assaulted their victims. There is no rhyme or reason as to why Dennis Floyd King is serving a sentence of not less than seventeen years nor more than fifty years, why Holland was permitted to plead to first degree life and have three other serious felony charges dismissed or why Dean Wildermuth was sentenced to death.

In studying the VanLone killing wherein Corbett and Glenn are charged with first degree murder and face the possibility of the death penalty, it is most difficult to understand why Dunn, who is equally culpable (possibly more culpable than the other two defendants) will go scot free from any criminal charges, in exchange for his testimony against the other two defendants.

Under the present statutory scheme and the way it is being implemented by prosecutors, the death penalty will still be rarely and unpredictably used in Colorado and the prosecutors' unbridled discretion will determine when and upon whom it will be utilized.

We further submit that because of the way Colorado's death penalty scheme is presently administered it serves no valid social purpose, has no proper place in the criminal justice system and does not preclude the death penalty from being arbitrarily and discriminatorily applied in the discretion of the prosecutor.

## CONCLUSION

For the above reasons the Amicus Curiae, Colorado State Public Defender System urges this Honorable Court to hold that the death penalty is a cruel and unusual punishment prohibited by the Eighth Amendment and that the Florida statutory death penalty scheme is unconstitutional in that it permits the death penalty to be arbitrarily and discriminatorily applied at the whim of the prosecutor.

Respectfully submitted,

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## APPENDIX A

## APPLICABLE FLORIDA STATUTES

## Fla. Stat. Ann. §755.082 (1974-1975 Supp.) Penalties for felonies and misdemeanors.

- (1) A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than twenty-five (25) calendar years before becoming eligible for parole unless the proceedings held to determine sentence according to the procedure set forth in section 921.141 results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death.
- (2) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, a person convicted of a capital felony shall be punished by life imprisonment as provided in subsection (1).
- (3) In the event the death penalty in a capital felony is held to be unconstitutional by the Florida Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death for a capital felony shall cause such person to be brought before the court, and the court shall sentence such person to life imprisonment as provided in subsection (1).<sup>1</sup>

## Fla. Stat. Ann. §782.04 (1974-1975 Supp.) Murder.

- (1) (a) The unlawful killing of a human being when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person

<sup>1</sup>This section was amended in 1974 in a manner that is not pertinent here.

engaged in the perpetration of, or in the attempt to perpetrate, any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of seventeen (years) when such drug is proven to be the proximate cause of the death of the user, shall be murder in the first degree and shall constitute a capital felony, punishable as provided in §755.082.

- (b) In all cases under this section the procedure set forth in section 921.141 shall be followed in order to determine sentence of death or life imprisonment.
- (2) When perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, or when committed in the perpetration of or in the attempt to perpetrate any arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, except as provided in subsection (1), it shall be murder in the second degree, and shall constitute a felony of the first degree, punishable by imprisonment in the state prison for life or for such term of years as may be determined by the court.
- (3) When perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate any felony other than arson, rape, robbery, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb, it shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in section 775.084.

Fla. Stat. §921.141 (1974-1975 Supp.) Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.

- (1) **Separate proceeding on issue of penalty.** Upon conviction or adjudication of guilt of a defendant of a capital felony the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by section 755.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If the trial jury has been waived or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsection (6) and (7), of this section. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.
- (2) **Advisory sentence by the jury.** After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:
  - (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6);
  - (b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which

outweigh the aggravating circumstances found to exist, and

- (c) Based on these considerations, whether the defendant should be sentenced to life . . . . or death.
- (3) **Findings in support of sentence of death.** Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:
  - (a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and
  - (b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsection (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with section 775.082.
- (4) **Review of judgment and sentence.** The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.



(5) **Aggravating circumstances.** Aggravating circumstances shall be limited to the following:

- (a) The capital felony was committed by a person under sentence of imprisonment.
- (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
- (c) The defendant knowingly created a great risk of death to many persons.
- (d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
- (e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
- (f) The capital felony was committed for pecuniary gain.
- (g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function of the enforcement of laws.
- (h) The capital felony was especially heinous, atrocious or cruel.

(6) **Mitigating circumstances.** Mitigating circumstances shall be the following:

- (a) The defendant has no significant history of prior criminal activity.
- (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- (c) The victim was a participant in the defendant's conduct or consented to the act.
- (d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

- (e) The defendant acted under extreme duress or under the substantial domination of another person.
- (f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
- (g) The age of the defendant, at the time of the crime.

## APPENDIX B

## APPLICABLE COLORADO STATUTES

Colorado Revised Statutes — 16-11-103. Imposition of sentence in class 1 felonies.

(1) Upon conviction of guilt of a defendant of a class 1 felony, the trial court shall conduct a separate sentencing hearing to determine whether the defendant shall be sentenced to death or life imprisonment. The hearing shall be conducted by the trial judge before the trial jury as soon as practicable. If a trial jury was waived or if the defendant pleaded guilty, the hearing shall be conducted before the trial judge.

(2) In the sentencing hearing any information relevant to any of the aggravating or mitigating factors set forth in subsection (5) and (6) of this section may be presented by either the people or the defendant, subject to the rules governing admission of evidence at criminal trials. The people and the defendant shall be permitted to rebut any evidence received at the hearing and shall be given fair opportunity to present argument as to the adequacy of the evidence to establish the existence of any of the factors set forth in subsection (5) or (6) of this section.

(3) After hearing all the evidence, the jury shall deliberate and render a verdict, or if there is no jury the judge shall make a finding, as to the existence or nonexistence of each of the factors set forth in subsections (5) and (6) of this section.

(4) If the sentencing hearing results in a verdict or finding that none of the factors set forth in subsection (5) of this section exist and that one or more of the factors set forth in subsection (6) of this section do exist, the court shall sentence the defendant to death. If the sentencing hearing results in a verdict or finding that none of the aggravating factors set forth in subsection (6) of this section or that one or more of the mitigating factors set forth in subsection (5)

of this section do exist, the court shall sentence the defendant to life imprisonment. If the sentencing hearing is before a jury and the verdict is not unanimous, the jury shall be discharged, and the court shall sentence the defendant to life imprisonment.

(5) The court shall not impose the sentence of death on the defendant if the sentencing hearing results in a verdict or finding that at the time of the offense:

- (a) He was under the age of eighteen; or
- (b) His capacity to appreciate wrongfulness of his conduct or to conform his conduct to the requirement of law was significantly impaired, but not so impaired as to constitute a defense to prosecution; or
- (c) He was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution; or
- (d) He was a principal in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution; or
- (e) He could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person.

(6) If no factor set forth in subsection (5) of this section is present, the court shall sentence the defendant to death if the sentencing hearing results in a verdict or finding that:

- (a) The defendant has previously been convicted by a court of this or any other state, or of the United States, of an offense for which a sentence of life imprisonment or death was imposed under the laws of this state or could have been imposed under the laws of this state if such offense had occurred within this state; or

- (b) He killed his intended victim or another, at any place within or without the confines of a penal or correctional institution, and such killing occurred subsequent to his conviction of a class 1, 2, or 3 felony and while serving a sentence imposed upon him pursuant thereto; or
- (c) He intentionally killed a person he knew to be a peace officer, fireman, or correctional official. The term "peace officer" as used in this section means only a regularly appointed police officer of a city, marshal of a town, sheriff, undersheriff, or deputy sheriff of a county, state patrol officer, or agent of the Colorado bureau of investigation; or
- (d) He intentionally killed a person kidnapped or being held as a hostage by him or by anyone associated with him; or
- (e) He has been a party to an agreement in furtherance of which a person has been intentionally killed; or
- (f) He committed the offense while lying in wait, from ambush, or by use of an explosive or incendiary device. As used in this paragraph (f), explosive or incendiary device means:
  - (I) Dynamite and all other forms of high explosives;
  - (II) Any explosive bomb or grenade, missile, or similar device; or
  - (III) Any incendiary bomb or grenade, fire bomb, or similar device, including any device which consists of or includes a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, and can be carried or thrown by one individual acting alone; or
- (g) He committed a class 1, 2, or 3 felony and, in the course of or in furtherance of such or

immediate flight therefrom, he intentionally caused the death of a person other than one of the participants; or

- (h) In the commission of the offense, he knowingly created a grave risk of death to another person in addition to the victim of the offense; or
- (i) He committed the offense in an especially heinous, cruel, or depraved manner.

Colorado Revised Statutes, 1973 – 18-3-102. Murder in the first degree.

(1)(a) After deliberation and with the intent to cause the death of a person other than himself, he causes the death of that person or of another person; or

(b) Acting either alone or with one or more persons, he commits or attempts to commit arson, robbery, burglary, kidnapping, sexual assault in the first or second degree as prohibited by section 18-3-402 or 18-3-403, or a class 3 felony for sexual assault on a child as provided in section 18-3-405(2), and, in the course of or in furtherance of the crime that he is committing or attempting to commit, or of immediate flight therefrom, the death of a person, other than one of the participants, is caused by anyone; or

Colorado Revised Statutes, 1973 – 18-3-103. Murder in the second degree.

(1)(a) He causes the death of a person intentionally, but not after deliberation; or



## APPENDIX C

IN THE DISTRICT COURT WITHIN AND  
FOR THE COUNTY OF EL PASO AND  
STATE OF COLORADO  
Criminal Action No. 27750  
Div. 5

|                      |   |            |
|----------------------|---|------------|
| THE PEOPLE OF THE    | ] |            |
| STATE OF COLORADO    | ] |            |
|                      | ] |            |
| vs.                  | ] | REPORTER'S |
|                      | ] | PARTIAL    |
| HOWARD DEAN BUCKNER, | ] | TRANSCRIPT |
|                      | ] |            |
| Defendant.           | ] |            |

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The above and foregoing cause came on for trial to a jury, with the Hon. John F. Gallagher, District Judge, presiding, on the 3rd day of February, 1976, in the El Paso County Judicial Building, Colorado Springs, El Paso County, Colorado.

## APPEARANCES:

|                    |   |
|--------------------|---|
| FOR THE PEOPLE:    | David Zook, Deputy District Attorney, and<br>John T. Riggs, Deputy District Attorney.     |
| FOR THE DEFENDANT: | Barney Iuppa, Deputy State Public Defender,<br>Chad Milton, Deputy State Public Defender. |

WHEREUPON, the following stipulation was entered on the record by counsel for the respective parties;

MR. IUPPA: Your Honor, I think the last matter concerns the matter of the death penalty. Mr. Buckner as he presently is charged, does not come under the new Colorado statute that does allow for the death penalty. Mr. Zook and myself have discussed the matter. We have agreed to enter into a stipulation, the nature of the stipulation being that under the provisions of the amended statutes, 1973 as amended, 16-11-103, under Subsection 6, it lists out several aggravating factors which in essence provide that if any of these aggravating factors do exist, that it shall be mandatory for the Court to impose the death penalty, unless some of the mitigating circumstances enunciated in 16-11-103 (5) are present.

It is my understanding that the District Attorney is willing to stipulate that none of the aggravating factors enumerated under 16-11-103, Paragraph Six, (a) through (i), that none of those aggravating factors are in existence in this case, and that the death penalty is not being asked for, not being sought, nor is it to be a penalty in this case.

MR. ZOOK: That is correct, Your Honor. We don't feel we could meet any burden, the burden of proof which would be upon us to demonstrate the presence of any of the aggravating factors, and we have no evidence to support any of them, and therefore have not alleged and have not requested the death penalty, and will not do so.

I might also add, Your Honor, that the evidence perhaps might also demonstrate the presence of some of the mitigating circumstances. I can't agree to that, but perhaps it may.

So for those reasons, we are not asking for it, and don't feel we would be entitled to it.

THE COURT: There are a couple of — The Court will approve that stipulation. There are a couple of questions I'd like to ask, though:

First, it's my understanding that the statute calls for, in the event there [sic] there is a finding of guilty of First

Degree Murder, the statute provides for a second hearing in front of the jury. Inasmuch as this stipulation is going to be entered into, will there be any necessity for such a second hearing?

MR. IUPPA: I believe we will have the second hearing, but I think what the essence will be, would be for the Court informing the jury of the stipulation, and ordering a directed verdict, in essence, that the only verdict that they can return is one that none of these aggravating circumstances exist.

MR. ZOOK: I think that's -- I think so, Your Honor.

MR. RIGGS: I think since the provision is that there be a second hearing, I think you have to have it, but we would just advise them that they can't consider the death penalty, because of the stipulation, and Life would be the only penalty.

\* \* \* \* \*

STATE OF COLORADO )  
 ) CERTIFICATE OF REPORTER  
COUNTY OF EL PASO )

I, CHARLES W. PISHNY, C.S.R., Official Court Reporter within and for the Fourth Judicial District of the State of Colorado, do HEREBY CERTIFY that the foregoing pages numbered from 1 through 2, constitute a full, true, correct and complete transcript of the stipulation entered into between counsel for the respective parties during trial of the case of The People of the State of Colorado versus Howard Dean Buckner, Criminal Action No. 22750 in Division Five of the District Court within and for the County of El Paso and State of Colorado.

IN WITNESS WHEREOF, I have hereunto set my hand in the City of Colorado Springs, County of El Paso and State of Colorado, this 13th day of February, 1976.

/s/ Charles W. Pishny  
Charles W. Pishny, C.S.R.  
Official Court Reporter

# APPENDIX D

IN THE DISTRICT COURT IN AND FOR THE

CITY AND COUNTY OF DENVER

STATE OF COLORADO

Criminal Action No. CR 4401, Ct. Rm. 10

THE PEOPLE OF THE )  
STATE OF COLORADO )

*Plaintiff,* )

*vs.* )

ROBERT LEE ROMERO )

*Defendant* )

STIPULATION RE:  
DEATH PENALTY

The District Attorney, on behalf of the People of the State of Colorado, will not seek the death penalty in this case and will not seek to death-qualify the jury.

/s/ Peter R. Bornstein  
District Attorney

/s/ Alvin D. Lichtenstein  
Attorney for Defendant

This stipulation is approved by the Court and the Court agrees not to consider the death penalty in this case.

DONE AND SIGNED THIS 26TH day of November,  
1975

/s/ Robert P. Fullerton  
Judge Robert P. Fullerton

see

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